12-442

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 351. 91

JOSEPH SWIFT, EDWIN SWIFT, ELIZABETH CARROLL, AND ELLEN CARROLL, APPELLANTS,

vs.

JANET SMITH, ADMINISTRATRIX OF DAVID SMITH, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 15, 1877.

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INDEX.

	Original.	Print.
Bond for costs	2	1
Record from circuit court Cook County	3	2
Bill of complaint	4	2
Summons	23	10
Appearance	25	11
Summons	26	12
Affidavit of non-residence	30	14
Publication	31	14
Answer of Edwin and Joseph Swift	33	16
George Chandler	55	26
Elizabeth and Ellen Carroll	56	27
N. C. Perkins	60	28
Default as to certain defendants	63	30
Answer of Charles R. Carroll	64	30
Order of reference	65	31
Affidavit of Orrin Skinner	66	31
Order for production of note and deed	68	32
Bill pro confesso as to George N. Williams	70	33
Commission	71	34
Deposition of Charles C. Waite	75	36
Silas N. Waite	81	39
Petition for removal of cause	86	42
Bond for removal of cause	90	44
Order for removal of cause	93	45
Testimony of George Watson	95	46
Francis A. Hoffman, jr	125	60
John Watson	129	62
Thomas Parker	141	68
Adolf Heile	151	73
John Watson	154	74
George Watson	155	74
C. V. Dyer	158	76

	Original.	Print.
Certificate of clerk	163	78
Order of reference in United States circuit court	164	79
Motion to amend petition for removal	164	79
Replication	166	80
Decree	167	80
Certificate of evidence	172	82
Appeal bond	270	120
Clerk's certificate	273	122
Opinion	274	122

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second year.

WILLIAM H. BRADLEY, *Clerk.*

JANET SMITH, ADMINISTRATRIX OF DAVID SMITH, deceased,
vs.
NORMAN C. PERKINS, GEORGE N. WILLIAMS, Obadiah Jackson, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life-Insurance Company
2 of Newark, New Jersey, Eli F. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orvis, J. L. Orvis, Isaac Meyer, Mayer Palnitski, Aaron Barnett, John J. Morgan, Bernard Guisburg. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-ninth day of June, A. D. 1877, came the said defendants Joseph Swift and Edwin Swift, by Messrs. Gondy, Chandler and Skinner, their solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, their bond for costs, and at the same time filed in said clerk's office a transcript of the record of the proceedings had in the circuit court of the county of Cook in the State of Illinois, in said entitled cause, which said bond and transcript are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, May term, A. D. 1877. In chancery.

JANET SMITH, ADMINISTRATRIX, &C.,
v.
NORMAN C. PERKINS, TRUSTEE, ET AL.

3 We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by her hereby agree and stipulate that execution may issue against our property for any costs taxed against us.

Dated this 29th day of June, A. D. 1877.

GONDY, CHANDLER AND SKINNER.

(Endorsed:) Filed June 29, A. D. 1877. Wm. H. Bradley, clerk.

	Original.	Print.
Certificate of clerk	163	78
Order of reference in United States circuit court	164	79
Motion to amend petition for removal	164	79
Replication	166	80
Decree	167	80
Certificate of evidence	172	82
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Opinion	274	122

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second year.

WILLIAM H. BRADLEY, *Clerk.*

JANET SMITH, ADMINISTRATRIX OF DAVID Smith, deceased,
vs.
NORMAN C. PERKINS, GEORGE N. WILLIAMS, Obadiah Jackson, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life-Insurance Company
2 of Newark, New Jersey, Eli F. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orvis, J. L. Orvis, Isaac Meyer, Mayer Palnitski, Aaron Barnett, John J. Morgan, Bernard Guisburg. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-ninth day of June, A. D. 1877, came the said defendants Joseph Swift and Edwin Swift, by Messrs. Gondy, Chandler and Skinner, their solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, their bond for costs, and at the same time filed in said clerk's office a transcript of the record of the proceedings had in the circuit court of the county of Cook in the State of Illinois, in said entitled cause, which said bond and transcript are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, May term, A. D. 1877. In chancery.

JANET SMITH, ADMINISTRATRIX, &C.,
v.
NORMAN C. PERKINS, TRUSTEE, ET AL.

3 We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by her hereby agree and stipulate that execution may issue against our property for any costs taxed against us.

Dated this 29th day of June, A. D. 1877.

GONDY, CHANDLER AND SKINNER.

(Endorsed:) Filed June 29, A. D. 1877. Wm. H. Bradley, clerk.

REC. 351—1

Transcript of record from circuit court of Cook County, Illinois.

4 UNITED STATES OF AMERICA,
State of Illinois, Cook County, ss:

Pleas before the honorable W. W. Farwell, one of the judges of the circuit court of Cook County, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the twenty-first day) of May, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 101st.

Present, honorable W. W. Farwell, one of the judges of the circuit court of Cook County, State of Illinois; L. L. Mills, State's attorney; Charles Kern, sheriff.

Attest:

JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 29th day of January, A. D. 1877, Janet Smith, administratrix, &c., by W. T. Burgess, esq., filed in said court her certain bill of complaint, and caused to be issued out of said court, under the seal thereof, the people's writ of summons, directed to the sheriff of Cook County to execute, which said bill and writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

To the circuit court of the county of Cook and State of Illinois, in chancery sitting:

5 Complaining shows unto this honorable court your oratrix, Janet Smith, administratrix of the estate of David Smith late of said county, deceased: That on the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and sixty-eight, Charles C. Waite was seized in fee in his own right of those certain lands and premises, situate in the city of Chicago, in said county, and known & described as follows, viz: Lots numbers fifteen (15) and sixteen (16) in block No. one hundred and eleven (111) in the school section addition to Chicago, and being so seized thereof, he, said Waite, with his wife, did for the consideration price of thirty-six thousand dollars & upwards sell, & by deed of that date, convey to George N. Williams the said lands and premises, which deed was duly recorded in the recorder's office of said county on the 24th day of October, A. D. 1868.

That on that occasion and to secure the payment of part of the purchase money of the said premises the said Williams made his two certain promissory notes, each dated said 1st day of October, A. D. 1868, payable to the said Charles C. Waite or order at the bank of A. C. & O. F. Badger, in Chicago, Illinois, one for six thousand dollars at one year from date, and the other for thirty thousand dollars ($30,000) at four years from date, each with interest at eight per cent. per annum, payable semi-annually on the first days of April & October in each year, and therewith on the same occasion to further secure the payment of said part of said purchase-money, said Williams made and delivered his deed to Obadiah Jackson whereby, after reciting the making of
6 said notes, and that they were for part of the purchase-money of said premises, and in order to secure the payment of the sums of

money in the said notes mentioned, with interest as therein specified, he, said Williams, did grant, bargain, sell, & convey to said Jackson, and to his heirs and assigns & successor in trust forever, all of the said lands and premises herein above described, in trust, that in case default should be made in the payment of said notes or either of them, or of the instalments of interest due thereon, then on application of the legal holder of the note on which default had been made, to enter into and upon all & singular the said premises, and with or without entry, to sell and dispose of the same as therein provided, to make a deed conveying the same to the purchaser, and out of the proceeds to pay, first the costs and expenses of such sale; second, the amount due on said note, it being expressly provided that in case of a sale for default in payment of part of said note thereby secured the whole thereof should be deemed to be due; third, any overplus to be paid to said Williams or his legal representatives; and upon the further trust, that upon the payment of the principal and interest mentioned in said promissory notes at the times when they should respectively mature, then to reconvey said premises to said Williams at his cost; and the said Williams did also covenant thereby to keep the buildings on said premises insured, to pay the taxes and assessments on said premises; and that he was well seized of the premises, had good right to convey them, that they were free from incumbrances, and to warrant and defend the same, with release
7 of homestead exemption, which deed was duly acknowledged and filed for record the 24th day of October, A. D. 1868, and recorded book 487 of deeds, at page 172, in the recorder's office of said county, by which, now in the possession of your oratrix, and said record, reference being thereto had will, among other things, more fully and at large appear.

And your oratrix shows that the said trust deed does not contain any provision whereby the duty of any purchaser thereunder to see to the application of the purchase-money is waived or released, and she charges that it is, and at all times since the making thereof has been, the duty of any person claiming that the debt thereby secured to the said Charles C. Waite, or the legal holders of said notes, had been paid, or the lien thereof on said premises discharged through or by the act of said trustee, Obadiah Jackson, to see that such payment had in part been made of said debt, & of the whole thereof, and more especially so if claimed to have been made before the said notes all matured and fell due.

That afterwards, and on the 5th day of October, A. D. 1868, the said George N. Williams conveyed the said lands & premises by deed of that date and subject to said trust deed to one Mary P. Moody.

That the said note to Charles C. Waite, for six thousand dollars, was duly paid and satisfied when due, and the one for thirty thousand dollars was by him some time between the date thereof & the 30th day of October, A. D. 1870, duly assigned and indorsed to Silas M. Waite in writing thereon, and by the said Silas M. Waite about the date last
8 aforesaid duly assigned and indorsed to said Obadiah Jackson in writing thereon, who thereby became, and on the 18th day of April, A. D. 1871, and before the maturity of said note, was the legal owner & holder thereof, and entitled to receive the money due and to become due thereon; and so owning and holding said note, said Jackson on said last-mentioned day, and while the fee of said premises was in the said Mary P. Moody, subject to the payment of said note, became and was justly indebted unto David Smith (since deceased) in the just and full sum of thirty-one thousand and five hundred dollars ($31,500), and

to secure the payment thereof made to him a certain promissory note in the words and figures substantially as follows:

$31,500.] CHICAGO, ILL., *Apr.* 18, 1871.

Two years after date I promise to pay to David Smith or order at thirty-one thousand five hundred dollars for value received, with interest at the rate of eight per cent. per annum, payable semi-annually, having deposited with him as collateral security a note of George N. Williams for thirty thousand dollars secured by trust deed to Obadiah Jackson, as trustee, which I hereby give the said David Smith authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter or before, in the event of said securities depreciating in value, at public or private sale at his discretion, without advertising the same or giving any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of said collaterals, and in case the proceeds of the sale of the said collaterals shall not cover the principal, interest, and expenses, I promise to pay the deficiency forthwith after such sale.

9

OBADIAH JACKSON.

That under said note is a warrant of attorney given therewith by said Jackson to confess judgment thereon in favor of the holder thereof in any court of record of this State, after the same became due against him, with costs & attorneys' fees & release of errors, as among other things will on reference to said note and warrant of attorney more fully and at large appear.

That at the same time and with said note so made by him, said Jackson, he, said Jackson, duly assigned and endorsed and delivered to the said Smith the said note for $30,000 made by the said George N. Williams, whereby the said David Smith then became, and thereafter during his lifetime remained, and your oratrix, upon his decease, became and since has been and now is the legal holder and owner of said note, and the trust deed accompanying the same, which was at the same time delivered to said Smith holding the same as collateral security for said note of said Jackson hereinabove set out. That the note and trust deed mentioned in said note made by said Jackson are the same note and trust deed hereinabove set out as made by said Williams.

That the said Jackson, before delivering said note of Williams to said Smith, placed thereon an indorsement that all interest had been paid thereon to the 17th day of May, 1871, since which time no interest has been paid thereon, and your oratrix avers and charges that the whole amount thereof with interest from that date so far as may be necessary to pay the note of said Jackson held by her is a lien and charge upon said lands & premises under said trust deed, and that she has the right to have the same so applied under the order and direction of this court.

10

That after the said note of said Williams had been so transferred to said Smith, as above herein stated, and on or about the 17th day of May, A. D. 1871, by her deed of that date, said Mary P. Moody conveyed the said lands to Charles V. Dyer in fee, subject to said trust deed to said Jackson, which deed was duly recorded the 25th day of May, A. D. 1871, in said recorder's office.

That afterwards, and on or about the first day of June, A. D. 1872, in consideration, among other things, that the said Jackson assumed,

and did agree to pay said note for $30,000, secured by said trust deed, and then and thereby a charge and lien upon said premises, the said Charles V. Dyer and his wife, by their deed of that date, with full covenants of warranty, seizure, and against incumbrances, did convey said lands to said Jackson, which deed contained and contains the recital following, to wit: "Subject, nevertheless, to a trust deed given by George N. Williams, dated October 1st, 1868, recorded in book 487 of deeds, page 172, to secure a certain note on which is due $30,000 and interest; also subject to a trust deed to James B. Runnion, trustee, dated May 17th, 1871, duly recorded in the recorder's office of Cook County, Illinois, the payment of both of which incumbrances is hereby assumed by the party of the second part" (the said Jackson meaning), which said deed containing said recital was filed for record in the said recorder's office and duly recorded the eighteenth day of June, A. D. 1872, as among other things will, on reference to said deed and the record thereof, more fully and at large appear.

11

That thereby, on the face of the record (and notice thereof to all persons claiming under him), the said Jackson took and accepted said conveyance of said lands & premises from said Dyer, subject to the payment of said note then in the hands and legally held by said David Smith as aforesaid, as an existing outstanding lien, charge, & incumbrance on said lands under said trust deed, and the said Jackson so having acquired the legal title to said lands and premises charged of record with and subject to the payment of said debt, thereby incapacitated himself from acting as trustee under the powers contained in said trust deed in that behalf, and thereafter continued to and now holds or those claiming under him hold the same subject to the said trust deed as a mortgage and charge on said lands.

And your oratrix further shows that notwithstanding the premises, and such conveyance by said Dyer to said Jackson, and the recitals therein contained, that said note for $30,000 and interest secured by said trust deed remained unpaid, and the fact that the said note was not then due and was then outstanding and held by said David Smith (then in life) as hereinabove stated, on or about the third day of August, A. D. 1872, Joseph Swift, Edwin Swift, and Norman C. Perkins, caused to be filed for record in said recorder's office a certain pre-

12

tended deed of release purporting to, and whereby they claim that the said Obadiah Jackson did, on the second day of October, A. D. 1871 (the day of the date thereof), in consideration of the sum of one dollar to him paid, the receipt whereof was thereby specially acknowledged, and for other good and valuable considerations, grant, remise, convey, release, & quitclaim unto Charles V. Dyer all right, title, interest, claim, and demand which he, Jackson, might have acquired in, through, or by, a certain trust deed bearing date the first day of October, A. D. 1868, duly recorded in the office of the recorder of Cook County, State of Illinois, in book No. 487 of deeds, at page 172, to the premises therein described, namely: Lots 15 and 16, in block 111, in the school section addition to Chicago, in Cook County, Illinois, which trust deed was made to secure the payment of the sum of thirty-six thousand dollars, evidenced by two promissory notes bearing even date therewith from George N. Williams to C. C. Waite.

But your oratrix, upon information and belief, avers and charges that the said pretended release was never in fact delivered by the said Jackson to the said Dyer & by said Dyer accepted knowingly and intentionally or otherwise; that the certificate of the pretended acknowledgment thereof bears date the third day of August, A. D. 1872; that it was not

in fact signed until that day, and that when so signed and acknowledged it was an attempt to perpetrate a gross fraud on the part of and by said Jackson upon the rights and equities of said David Smith, the then legal holder of the said $30,000 note; and having in his possession the trust deed accompanying the same, which was by the said deed of said Dyer to said Jackson then recognized of record as a valid and subsisting lien on said premises to be paid by said Jackson; was, if executed as claimed, so executed without any good or valuable consideration in fact paid therefor, the truth as to which fact all persons acquiring title under him, Jackson, to said premises were bound to inquire into and ascertain at their peril; and when so recorded the note of $30,000 thereby secured had not matured, and under the power and trust in said trust deed to him contained, the time had not arrived at which a reconveyance of the premises by said Jackson to the said Williams or his assigns could be executed.

13

And your oratrix further shows that on the said third day of August, A. D. 1872, there was also filed in said recorder's office a deed dated the first day of June, A. D. 1872, made by said Obadiah Jackson and his wife, and acknowledged on the 29th day of June, A. D. 1872, whereby they, after reciting an indebtedness to Joseph Swift of $25,000, secured by the bond of said Obadiah Jackson to him in the penalty of $50,000, conditioned for the payment of said sum of $25,000 on the first day of June, A. D. 1877, with interest at nine per cent., payable semi-annually, and of an indebtedness to Edwin Swift of $25,000, secured to be paid by the bond of said Jackson to him in the penal sum of $50,000, conditioned for the payment of said $25,000 on the first day of June, A. D. 1877, with interest at nine per cent., payable semi-annually, did convey said lands and premises to Norman C. Perkins (Henry Truman & Michael W. Robinson, successors in trust), with covenants of warranty and power of sale of said lands and premises in case the said debts were not promptly paid according to the conditions of said bonds, respectively, as by the said deed when produced will, among other things, more fully & at large appear.

14

And your oratrix further shows that on or about the 14th day of November, A. D. 1876, there was filed in said recorder's office a trust deed made by said Jackson and his wife, dated the 13th day of November, A. D. 1876, whereby they, after reciting the indebtedness of said Jackson to Elizabeth Carroll, Ellen Carroll, and to them as guardians of Charles R. Carroll, evidenced by his notes to them in various sums, amounting to about $50,000, did convey with other lands the said lands and premises herein above described to George Chandler (making Henry A. Gardner successor in trust) in trust to secure the payment of said notes, and with power of sale of said premises and conveyance thereof in case said notes or any of them were not paid when due, as by the said trust deed when produced will, among other things, more fully & at large appear.

And your oratrix further shows that the said Jackson during the lifetime of said David Smith, and afterwards until the 26th day of October, A. D. 1876, kept paid the interest as it accrued on his own note to the said Smith, up to which last mentioned date the said note had been from time to time after it fell due, the 18th day of April, 1873, by agreement with said Jackson, extended by said Smith during his lifetime & by your oratrix after his death, at all times relying upon said note and trust deed deposited therewith as collateral thereto, as a good and valid security and a lien upon said lands and premises, they not knowing of said pretended release or of the recording of the same

15

and having no reason to suppose any such paper writing had an existence. That on the 26th day of October, A. D. 1876, the said Jackson paid your oratrix on account of interest on his note the sum of one thousand dollars, and promised to pay the residue due for interest for the extension of his said note in a short time.

That soon after and after the fourteenth day of November, A. D. 1876, the fact of the making of said trust deed by said Jackson to said Chandler came to the knowledge of your oratrix and she thereupon caused an examination of the records to be made, and then for the first time did she discover that the said pretended release had been put upon the record and the making of the deeds by said Jackson and wife to said Perkins, and that any person was claiming that the said trust deed had been duly discharged & released, and she avers that the said David Smith did not know during his lifetime of the fact of such pretended release having been made or recorded; and she avers that he at all times from the time he accepted and received from said Jackson the said note and trust deed made by said Williams, treated the said note and trust deed as a good and valid lien upon said premises, and relied thereon as such in making the said extensions to said Jackson of the payment of his (Jackson's) note.

16 That holding said note made by Williams merely as collateral, and the said Jackson always paying the interest on his own note, it never became necessary until after said Jackson had failed to pay the interest on his own note to Smith to call upon the said Williams for payment or to resort to the lands and premises described in said trust deed thereunder for such payment.

That on the sixth day of February, A. D. 1875, the said David Smith departed this life intestate, leaving your oratrix, his widow, him surviving, who afterwards and on or about the 19th day of March, A. D. 1875, was by the county court of Cook County sitting in probate, duly appointed administratrix of the estate, rights, credits, and effects of said David Smith, deceased, among which was the said note of the said Jackson, and the said note of the said Williams, & the accompanying trust deed pledged and held as collateral security therefor as hereinabove stated & set forth; and she to the letters of administration granted to her by said county court upon said estate, prays leave to refer for the contents thereof when produced for greater certainty.

That immediately upon discovering that the said pretended release had been recorded your oratrix caused judgment to be entered in her favor against said Jackson, upon the note made by him, in the superior court of Cook County for the sum of thirty-two thousand four hundred and eighteen dollars damages and costs under the warrant of attorney accompanying said note, on the twenty-fourth day of November, 1876, and sued out execution thereon to the sheriff of Cook County and delivered the same to him that day, which writ was afterwards, on

17 the day of returned by said sheriff of said county unsatisfied, and with his return thereto thereon indorsed, filed in the office of the clerk of said superior court, whereupon your oratrix filed in the circuit court of Cook County on the chancery side thereof her bill of complaint, usually called a creditor's bill, against the said Jackson and others as having property of his in their hands. Among other things setting forth the recovery of said judgment, the issue of an execution thereon and its return unsatisfied, and praying among other things for a discovery of the property of said Jackson and its application to the payment of said judgment, upon which bill your oratrix obtained against the said Jackson the ordinary injunction allowed upon cred-

itors' bills, which was duly served, and the said Jackson hath appeared in said suit and obtained time to answer said bill of complaint, and the same is now pending in said court.

That as yet your oratrix has not been able to realize or collect anything by means of said judicial proceedings against said Jackson, and that he is now justly indebted to her in the sum of thirty-two thousand four hundred & eighteen dollars, the amount of said judgment, and interest thereon from the rendition thereof, and that she holds as collateral security for the payment thereof the said note and trust deed made by the said George N. Williams, and the lien thereof upon the said lands & premises, and is entitled to the aid of this court to enforce the same for the payment of said judgment.

And your oratrix further shows that David Vernon, the Mutual
18 Benefit Life Insurance Company, of Newark, New Jersey, Eli F. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orvis, J. L. Orvis, Isaac Meyer, Aaron Barnett, Mayer Paliusski, John J. Morgan, Bernard Giusbury claim to be judgment creditors of said Jackson or otherwise to have a lien on said premises, or to be in possession thereof under leases as tenants four years.

And your oratrix further charges that all of the defendants in this suit claiming title through said Jackson had notice of the fraudulent character of said release, and that all and each of them claiming by, through, or under said Jackson were and are bound by & had notice of all and each of the facts appearing on the public records of Cook County, & especially of all of the facts recited in the deeds and chain of title to said Jackson.

And your oratrix charges that said Perkins, as trustee, and the said Joseph & Edwin Swift and each of them had actual notice that said release had never been delivered to said Dyer, and charges that the said release was actually delivered by said Jackson to them or some of them.

And your oratrix further charges that each and all of said defendants had notice of all the facts or of facts sufficient to put them on enquiry, and were mala fide purchasers of said premises.

And your oratrix had well hoped that the said defendants in this suit or some of them would have paid the said sum of money so due to your oratrix as aforesaid, or so much thereof as remains a lien and charge upon the said lands and premises (she charging that the amount
19 due upon the face of said note by Williams and trust-deed is greater than what is due her upon her said judgment, and that she is entitled to the full benefit of said security so far forth as may be necessary to protect her in the premises), and hath frequently and in a friendly manner requested them so to do; but now so it is, may it please this hon. court, the said defendants, combining and confederating with divers persons to your oratrix unknown (but whose names when discovered she prays may be inserted herein with proper and apt words to charge them), how to injure, wrong, and defraud your oratrix in the premises, neglect and refuse to comply with the reasonable requests of your oratrix in the premises, and for excuse allege a variety of false and untounded pretenses, and among others, that the said trust-deed so made by the said Jackson to the said Norman C. Perkins is a prior lien to that of your oratrix under said trust-deed made by said Williams to said Jackson, the contrary whereof your oratrix charges to be the case, and they also pretend and give out that the said deed to said George Chandler is also a prior lien to that of your oratrix under said

trust-deed made by said Williams, the contrary whereof your oratrix charges to be the case.

And she expressly charges that all of the defendants in this suit having or claiming to have any lien, incumbrance, conveyance, assignment, or charge of or upon said premises under or through the said Jackson took & acquired the same with notice of the facts (and she charges the facts so to be) that the said note so made by said Williams was due and has at all times remained wholly unpaid, except the interest
20 thereon up to the 17th day of May, 1871, was held by the said David A. Smith during his lifetime and by your oratrix since his death as his administratrix, as such collateral as aforesaid, the legal title thereto being during all that time vested in them successively, was secured by said trust-deed to Obadiah Jackson, and thereunder a lien on said lands and premises; that the payment thereof had been assumed by said Jackson upon the conveyance of said lands to him; that the said pretended release was without consideration, was, in fact, though dated the 2d day of October, A. D. 1871, not executed until the third day of August, A. D. 1872, and never delivered to and accepted by said Dyer at that time or at its pretended date, or at any time afterwards; was executed (if at all, which she denies), from its date and record before, by the terms of said trust-deed, the said Jackson had any authority to execute it as trustee under the Williams trust-deed to him, and that said Jackson had no authority to release the same at any time except upon the payment of said note to your oratrix or her intestate.

That the said Dyer sometimes gives out and pretends that the said pretended release deed was delivered to him, but if so your oratrix charges that it was so delivered & accepted by him by collusion & conspiracy entered into between him and said Jackson to wrong and defraud the said David Smith in the premises, for that the said Dyer well knew when he acquired title to said land, and at the time of his conveyance to said Jackson that the said David Smith held said note of Williams; that the same was wholly unpaid; that the same had been duly assigned and indorsed by said Jackson to said David
21 Smith as collateral security for his (Jackson's) own note as herein above charged, and that he, Jackson, on the 1st day of October, 1871, did not hold the same, but had parted therewith to said Smith as hereinabove charged, and that by means of the premises the said Jackson had incapacitated himself from acting as trustee; that such pretended release was without consideration in fact, and that the accepting by him, Dyer, of said pretended release, and causing the same to be recorded (if operative at all, which she denies,) could only operate in fraud of the rights of said David Smith in the premises.

And your oratrix further shows that the said lands and premises are but a scant & insufficient security for the payment of the sum of money properly chargeable thereon under said Williams trust-deed in her favor; that they are now in the occupation of tenants who have acquired their leases from said Jackson since the making of said deed; that she is entitled under said deed to the possession of said premises, & to the application of the rents, issues, & profits thereof to the payment of her said lien.

All which actings and doings, neglects, pretences, and refusals are contrary to equity and good conscience, and tend to the manifest wrong, injury, and prejudice of your oratrix in the premises. In consideration whereof, and inasmuch as your oratrix is therein remediless at the common law, and can only have relief in a court of equity where such matters are properly cognizable and relievable; to the end therefore that

the defendants to this bill may without oath answer the same (their answer under oath being hereby expressly waived); that it be referred to a master to take and state an account of what is due
22 your oratrix, administratrix of David Smith, deceased, in the premises upon the said judgment.

That it also be referred to take & state an account of what is due upon the said note made by the said Williams.

And that upon the coming in and confirmation of such report, unless the said defendants or some of them shall redeem the said Williams note from the pledge thereof made by said Jackson as aforesaid by the payment of the amount found due your oratrix on her said judgment and costs of this suit by some short day to be fixed by this court, that then the said lands and premises be sold under the order and decree of this court, and out of the proceeds thereof the said judgment of your oratrix with the costs of this suit be first paid, and the residue, if any, brought into court to abide its order.

And that the said defendants and each & all of them be barred and foreclosed of & from all equity of redemption, right, title, and estate in the premises so sold, unless the same shall be redeemed from such sale according to the statute in such case made.

And that they and each of them be enjoined and restrained from setting up any title of, in, to, or out of the same adverse to your oratrix or those claiming under said sale, or for such other or further relief as the nature of her case shall require, & as to this court shall seem meet & agreeable to equity & good conscience,

May it please this honorable court to grant your oratrix pro-
23 cess of summons against the said Obadiah Jackson, George N. Williams, Norman C. Perkins, Joseph Swift, Edwin Swift, George Chandler, Ellen Carrol, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company of Newark, New Jersey, Eli T. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orris, J. L. Orris, Isaac Meyer, Mayer Paleintski, Aaron Barnett, John J. Morgan, Bernard Guisbury, defendants, to appear & answer, and to abide by & perform the order and decree of this hon. court in the premises.

And your oratrix will ever pray, &c.

JANET SMITH,
Admx., &c.

W. T. BURGESS,
Sol'r, &c.

Summons.

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon Norman C. Perkins, Obadiah Jackson, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company, of Newark, New Jersey, Eli T. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank; Franklin K. Orris, John L. Orris, Isaac Meyer,

Aaron Barnett, Mayer Palintski, John J. Morgan, Bernard
24 Guisbury, and George N. Williams, if they shall be found in your county, personally to be and appear before the circuit court of Cook County, on the first day of the next term thereof, to be holden at the court house in Chicago, in said Cook County, on the third Monday of February next, to answer unto Janet Smith, administratrix of David Smith, deceased, in her certain bill of complaint filed in said court, on the chancery side thereof, and have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same.

Witness Jacob Gross, clerk of said court, and the seal thereof, at Chicago, in said county, this 29th day of January, A. D. 1877.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed:)

We, the undersigned, hereby accept service of a copy of the within summons and hereby enter our appearance in the within entitled cause this eighth (8th) day of February, A. D. 1877.

SHUFELDT & WESTON,
Sol'rs for E. T. Hollister & S. H. Gorham.
OBADIAH JACKSON,
MONROE, BISBEE & BALL,
Sol'rs for Nathan H. Walworth, receiver of the City National Bank of Chicago.
MICHAEL W. ROBINSON.
HENRY A. GARDNER.

Pd. $7.00.

Served the within writ on the within named Isaac Myer, Mayer Palintski, and Bernard Guibury, by delivering a copy thereof to
25 each of them the 16th day of February, 1877, also served the within writ on the within named Aaron Barnett, by leaving a copy thereof at his usual place of abode with E. L. Jacobson, a member of his family, (he being a person of the age of ten years and upwards,) at the same time informing him of the contents thereof, the 16th day of February, 1877. The president of the within named The Mutual Benefit Life Insurance Company, of Newark, New Jersey, not being found in my county, I have served the within writ by delivering a copy thereof to S. T. King, agent of said company, the 16th day of February, 1877. The other within named defendants not found in my county the 19th day of February, 1877.

CHARLES KERN, *Sheriff,*
By WILLIAM FOGARTY,
Deputy.

And thereupon, on the 9th day of February, A. D. 1877, there was filed in said cause the appearance of certain of the defendants in words and figures following, to wit:

STATE OF ILLINOIS, *ss:*

Circuit court of Cook County. Chancery.

JANET SMITH, ADM'X,
v.
NORMAN C. PERKINS ET AL.

We appear herein for the defendants, Edwin Swift, Joseph Swift,

George Chandler, trustee, Elizabeth Carroll, Ellen Carroll, and Elizabeth and Ellen Carroll, guardians of Charles R. Carroll.

Chicago, Feb'y 8th, 1877.

GOUDY, CHANDLER & SKINNER,
Sol'rs for said Def'ts.

26 And thereupon, on the 19th day of February, 1877, the following proceedings were had and entered of record in said cause, to wit:

JANET SMITH, ADMINISTRATRIX OF DAVID Smith, deceased, *vs.* NORMAN C. PERKINS ET AL. } 23438, 1692. Bill.

It is ordered by the court that the time for Edwin Swift, Joseph Swift, George Chandler, Elizabeth Carroll, Ellen Carroll, and Elizabeth Carroll and Ellen Carroll, guardians of Charles R. Carroll, (seven of the defendants herein,) to plead, answer, or demur to the bill of complaint in said cause be, and it hereby is, extended fourteen days from date.

And thereupon, on the 21st day of February, 1877, there issued out of said court, under the seal thereof, the people's writ of summons directed to the sheriff of Lee County to execute, and the people's alias writ of summons directed to the sheriff of Cook County to execute, which said writs with sheriffs' return thereon endorsed are in the words and figures following, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to the sheriff of Lee County,
27 greeting:

We command you, as we have commanded the sheriff of Cook County, that you summon Norman C. Perkins, Obadiah Jackson, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company, of Newark, New Jersey, Eli F. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank; Franklin K. Orris, John L. Orris, Isaac Myer, Aaron Barnett, Mayer Palintski, John J. Morgan, Bernard Ginsbury, and George N. Williams, if they shall be found in your county, personally to be and appear before the circuit court of Cook County, on the first day of the next term thereof, to be holden at the court-house in Chicago, in said Cook County, on the 3rd Monday of March next, to answer unto Janet Smith, administratrix of David Smith, deceased, in her certain bill of complaint filed in said court, on the chancery side thereof; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of said court, and the seal thereof, at Chicago, in said county, this 21st day of February, A. D. 1877.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed:)

28 Served this writ on the within named Franklin K. Orris & John L. Orris by delivering a copy thereof to them the 28th day of February, A. D. 1877.

JONATHAN N. HILL,
Sheriff Lee County.

Fees: service, $1.30; copies, .20; 8 mileage, .40; return, 10—$2.00. Sheriff's fees paid by plaintiff's attorney.

J. N. HILL, *Sheriff.*

Alias summons.

STATE OF ILLINOIS,
County of Cook, ss :]

The people of the State of Illinois to the sheriff of said county, greeting:

We command you again that you summon Norman C. Perkins, Obadiah Jackson, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company of Newark, New Jersey, Eli F. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orris, John L. Orris, Isaac Meyer, Aaron Barnett, Mayer Palintski, John J. Morgan, Bernard Ginsbury, and George N. Williams, if they shall be found in your county, personally to be and appear before the circuit court of Cook County, on the first day of the next term thereof, to be holden at the court-house in Chicago, in said Cook County, on the third Monday of March next, to answer unto Janet Smith, administratrix of David Smith, deceased, in her certain bill of complaint, filed in said court on the chancery
29 side thereof; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of said court, and the seal thereof, at Chicago, in said county, this 21st day of February, A. D. 1877.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed:)

Served the within writ on the within-named Norman C. Perkins, Henry Truman, Horace White, and David Vernon, by delivering a copy thereof to each of them the 26th day of February, 1877; also served the within writ on the within-named Ellen Carroll by delivering a copy thereof to her the 8th day of March, 1877; also served the within writ on the within-named Charles R. Carroll by leaving a copy thereof at his usual place of abode with Ellen Carroll, a member of his family, of the age of ten years and upwards, at the same time informing her of the contents thereof, the 8th day of March, 1877; also served the within writ on the within-named Charles V. Dyer, by leaving a copy thereof at his usual place of abode with Louis Dyer, a member of his family, of the age of ten years and upwards, at the same time informing him of the contents thereof, the 9th day of March, 1877.

The other within-named defendants not found in my county the 16th day of March, 1877.

CHARLES KERM, *Sheriff,*
By WILLIAM FOGARTY, *Deputy.*

$6.00 paid.

And thereupon, on the same day, to wit, the 21st day of Feb-
30 ruary, 1877, there was filed in said cause a certain affidavit of non-residence in words and figures following, to wit:

In the circuit court of Cook County. In chancery.

JANET SMITH, ADMINISTRATRIX OF DAVID Smith, deceased,
vs.
NORMAN C. PERKINS, GEORGE N. WILLIAMS, Obadiah Jackson, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company of Newark, New Jersey, Eli F. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orvis, J. L. Orvis, Isaac Meyer, Mayer Paliutski, Aaron Barnett, John J. Morgan, Bernard Giusbury, defendants.

STATE OF ILLINOIS,
County of Cook, ss:

William T. Burgess, of said county, being duly sworn, doth depose and say that the said George N. Williams hath departed from this State and no longer resides therein, and that he has been informed that the said Williams resides at Buffalo, in the State of New York.

31 W. T. BURGESS.

Sworn to and subscribed before me this 21st day of February, A. D. 1877.

JACOB GROSS, *Clerk.*

And thereupon, on the 24th day of February, 1877, there was filed in said cause a certain publication notice and certificate of mailing in words and figures following, to wit:

Publication notice.

STATE OF ILLINOIS,
County of Cook, ss:

Circuit court of Cook County, February term, A. D. 1877. In chancery.

JANET SMITH, ADMINISTRATRIX OF DAVID Smith, deceased,
vs.
NOMAN C. PERKINS, GEORGE N. WILLIAMS, Obadiah Jackson, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company, of Newark, New Jersey, Eli F. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orvis, J. L. Orvis, Isaac Meyer, Mayer Paliutski, Aaron Barnett, John J. Morgan, Bernard Giusbury.

Affidavit of the non-residence of George N. Williams, defendant above

named, having been filed in the office of the clerk of said circuit court of Cook County, notice is hereby given to the said George N. Williams that the complainant heretofore filed her bill of complaint in said court on the chancery side thereof, and that a summons thereupon issued out of said court against said defendant, returnable at the court-house in the city of Chicago, in said county, on the third Monday of March
32 next (1877) as is by law required, which cause is now pending and undetermined in said court.

JACOB GROSS, *Clerk.*

WM. T. BURGESS, *Compl't's Sol'r.*

Certificate of mailing.

STATE OF ILLINOIS,
Cook County, ss:

I, Jacob Gross, clerk of the circuit court of Cook County, in the State aforesaid, hereby certify that on the 24th day of February, A. D. 1877, being within ten days after the first publication of the within notice, I sent by mail a copy of said notice to the defendants named therein, as follows: one to Geo. N. Williams, at Buffalo, N. Y., in pursuance of section 12 of an act of the general assembly of the State of Illinois, in force July 1, 1872, entitled "An act to regulate the practice in courts of chancery."

Witness my hand and the seal of said court this 24th day of February, A. D. 1877.

[SEAL.] JACOB GROSS, *Clerk.*

And thereupon, on the 10th day of March, 1877, the following proceedings were had and entered of record in said cause, to wit:

JANET SMITH, ADMINISTRATRIX OF DAVID SMITH, deceased, *vs.* NOMAN C. PERKINS ET AL. } 23438, 1692. Bill.

On motion it is ordered that William J. Campbell be and he
33 hereby is substituted as solicitor for Elizabeth Carroll and Ellen Carroll, and as guardians of Charles R. Carroll, three of the defendants herein, in lieu of Messrs. Goudy, Chandler, and Skinner.

And on filing due proof of personal service of process issued in this cause on said defendant Charles R. Carroll, ten days at least before the return day thereof, on motion it is ordered that Edward Stewart, esq., be and he is hereby appointed guardian ad litem for said defendant, who is a minor, to appear and defend said cause in his behalf.

And thereupon, on the same day, to wit, the 10th day of March, 1877, there was filed in said cause the answer of Edwin and Joseph Swift, the answer of George Chandler, and the answer of Elizabeth and Ellen Carroll, in words and figures following, to wit:

STATE OF ILLINOIS, *ss:*

Circuit court of Cook County. In chancery.

JANET SMITH, ADMINISTRATRIX OF THE estate of David Smith, deceased,
v.
OBADIAH JACKSON, GEORGE N. WILLIAMS, Norman C. Perkins, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company, of Newark, New Jersey, Eli F. Hollister, Selden H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orvis, J. L. Orvis, Isaac Meyer, Mayer Paliutski, Aaron Barnett, John J. Morgan, & Bernard Giusbury.

34

The joint and several answer of Edwin Swift and Joseph Swift to the complainant's bill of complaint herein.

These defendants now and at all times hereafter reserving to themselves and to each of them all manner of benefit and advantage of exception to the said bill of complaint, by reason of the many imperfections and irregularities therein contained, for answer to the said bill or to so much thereof as the said defendants are advised it is necessary for them to make answer unto, severally answering say:

That as to the allegations in said bill contained, setting forth that on the 24th day of October, A. D. 1868, Charles C. Waite was seized in fee in his own right of, to wit, lots fifteen (15) and sixteen (16), in block one hundred and eleven (111), in the school section addition to Chicago; that being so seized, the said Waite with his wife, for the consideration price of thirty-six thousand dollars and upwards, did sell and by deed of that date convey to George N. Williams the said lands and premises; that said deed was recorded as in said bill averred, on the 24th day of October, A. D. 1868; that then and to secure a part of the said purchase money, the said Williams made his two certain promissory notes, one for the sum of six thousand dollars and one for the sum of

35

thirty thousand dollars, as set forth in said bill; that then and to further secure the payment of the said part of said purchase money, said Williams made and delivered his deed to Obadiah Jackson, with recitals as in said bill set forth, whereby the said Williams did grant, bargain, sell, and convey to said Jackson, and to his heirs and assigns, and successors in trust forever, all of the said lands and premises in trust; that in case default should be made in the payment of said notes or either of them, or the interest that should accrue thereon, then to sell said lands and premises, and apply the proceeds thereof as in said bill set forth, and upon the further trust that upon the payment of the said principal sum in said notes mentioned and the interest due thereon at the times when they should respectively mature, then to reconvey said premises to said Williams at his cost; that the said Williams did in said deed covenant and agree as in said bill set forth, and that said

deed was recorded as in said bill alleged; these defendants neither admit nor deny the same or any part thereof, but require strict proof by the said complainant in these behalfs.

That as to whether said alleged trust deed does not contain any provision purporting to release any purchaser thereunder from seeing to the application of the purchase money, these defendants neither admit nor deny the same, but require strict proof by the said complainant in this behalf; and they aver and say that it is not and has not been at any time, at or subsequent to the making of the said alleged deed of trust, the duty of any person claiming that the supposed debt in said bill alleged to have been secured by the said deed of trust or the legal holders of said alleged notes had been paid, or the alleged lien
36 on said premises discharged through or by the act of said trustee, Obadiah Jackson, to see that such payment had in fact been made of said supposed debt and of the whole thereof; and they further aver and say that it is not and has not so been the duty of any such purchaser to see to the application of the purchase money as aforesaid, whether the said alleged notes had all matured and fallen due, or whether they had not, or whether the said alleged deed of trust did or did not contain a provision purporting to release a purchaser thereunder from seeing to the application of the purchase money as aforesaid, or a provision of any sort in reference to such application. And the said defendants in this behalf further aver and say that they did not acquire the liens and titles, or either of them, to said lands and premises hereinafter set forth, through or by virtue of any sale or sales had or made under said deed of trust, but that they acquired the said liens and titles, and each and every of them hereinafter averred, by a due, proper, legal, and sufficient deed of convevance from the then owner of said lands and premises in fee simple.

That as to whether on the 5th day of October, 1868, the said George N. Williams conveyed the said lands and premises by deed of that date and subject to said alleged deed of trust to one Mary P. Moody, these defendants neither admit nor deny the same, but require strict proof thereof from the said complainant.

That as to the allegations in said bill contained that the said alleged note for thirty thousand dollars was assigned and endorsed by the said Charles C. Waite to Silas M. Waite, prior to the 30th day of October, A. D. 1870; that about then the said Silas M. Waite assigned and
37 endorsed said alleged note to the said Obadiah Jackson; that he thereby became and on the 18th day of April, A. D. 1871, and before the maturity of the said note was the legal holder and owner thereof and entitled to receive the money due and to become due thereon; that so owning and holding said note the said Jackson on the said last named day, and while the fee of said premises was in the said Mary P. Moody, subject to the payment of said note, became and was justly indebted unto David Smith (since dead) in the just and full sum of thirty-one thousand and five hundred dollars; that to secure the payment thereof, the said Obadiah Jackson made his certain promissory note for the said last named sum as in said bill set forth; that under said note the said Jackson gave a warrant of attorney to confess judgment thereon as set forth in said bill; that at the same time and with the said last named note the said Jackson assigned and endorsed and delivered the said alleged note for thirty thousand dollars to the said David Smith; that he thereby then became and thereafter during his lifetime remained, and upon his decease the said complainant became

and since has been and now is the legal holder and owner of said alleged note and the said alleged deed of trust; that the same was delivered to said Smith to hold the same as collateral security for the said note of said Jackson; that the said note and trust deed alleged to have been mentioned in the said note of the said Jackson are the same note and deed as the said bill alleges to have been made by the said Williams; that the said Jackson before delivering the said alleged note of the said Williams to the said Smith, placed thereon an endorsement, that all interest had been paid thereon to the 17th day of May, A. D. 1871, and that subsequent thereto no interest has been paid thereon; these defendants neither admit nor deny the same or any part thereof, but require strict proof from the said complainant in these behalfs and in each and every of them.

38

And the said defendants deny that the whole or any part of the amount of the said note for thirty thousand dollars, with interest thereon from the said last named date or from any date, whether to pay the said alleged note of the said Jackson, or for any purpose whatsoever, is a lien and charge upon the said lands and premises or upon any part thereof, in any manner, shape, or form, under said alleged trust deed, and they deny that the said complainant has the right to have the same so applied under the order and direction of this court, and in this behalf the said defendants aver and state that there are no prior valid liens or encumbrances of any sort upon said lands and premises, save the ones by them held and owned as hereinafter set forth.

That as to whether after the said alleged transfer of the said alleged note of the said Williams, and on or about the 17th day of May, A. D. 1871, the said Mary P. Moody, by deed, conveyed the said lands and premises to Charles V. Dyer, in fee, subject to the said deed of trust, to the said Jackson, and that said deed of the said Moody was recorded as in said bill set forth, these defendants neither admit nor deny the same, but require strict proof of each and every part thereof from the said complainant.

The said defendants admit that on or about the first day of June, A. D. 1872, the said Charles V. Dyer and his wife did by their certain warranty deed convey to the said Obadiah Jackson the said lands and premises, but as to whether said deed and conveyance were made for the considerations in said bill set forth, and as to whether said deed contained the recital in said bill averred, these defendants neither admit nor deny the same, but require strict proof thereof in all and singular from the said complainant. And in this behalf the said defendants aver and state that the said deed was so made for a good, valuable, and adequate consideration, and that when made the said alleged deed of trust of the said George N. Williams was not and never has been a lien and charge upon said lands and premises.

39

That as to whether the said Jackson took and accepted said conveyance of said lands and premises from the said Dyer, subject to the payment of the said note of the said Williams, alleged then to have been in the possession of the said David Smith, these defendants neither admit nor deny the same, but require strict proof thereof from the said complainant, and they deny that upon the face of the record there was any notice to any parties claiming under the said Jackson, and to these defendants in particular, of the claim and claims of the said complainant in said bill alleged, touching the said alleged note and deed of trust of the said Williams, and that the same were an existing and outstanding charge and lien and encumbrance upon said lands and premises, and that said alleged note and deed, or either of them, then or ever were such a charge,

lien, and encumbrance, these defendants expressly deny, and the said defendants aver and say, that when, as appears by the record in these behalfs, the said Obadiah Jackson may have acted as trustee,
40 touching said lands and premises, he had full and legal warrant and capacity so to do, and as to the charge of incapacity on the part of said Jackson to so act as trustee as set forth in the said bill of complaint, these defendants require strict proof thereof from the said complainant, and expressly deny that any party claiming under the said Jackson holds the said lands and premises, subject to the said alleged trust deed of the said Williams, as a mortgage and charge thereon, which said claim of the said complainant in said bill stated these defendants aver and say is wholly inequitable and unjust.

These defendants admit that on or about the 3rd day of August, A. D. 1872, there was filed for record, in the recorder's office for the said county of Cook, a certain deed of release that was by him duly made, executed, and delivered, whereby the said Obadiah Jackson, for certain considerations which these defendants aver were good, valuable, and adequate, granted, remised, conveyed, released, and quit-claimed unto the said Charles V. Dyer all right, title, interest, claim, and demand which the said Jackson might have acquired in, through, or by a certain deed of trust bearing date the 1st day of October, A. D. 1868, and recorded in the office of the recorder of the county of Cook, and State of Illinois, in, to wit, book No. 487 of deeds, at page 172, to the premises therein described, viz, lots fifteen (15) and sixteen (16), in block one hundred and eleven (111), in the school section addition to Chicago, in Cook County, Illinois, which trust deed was made to secure the payment of the sum of thirty-six thousand dollars, evidenced by two promissory notes bearing even date therewith, from George N. Williams to C. C. Waite; but as to whether said deed of trust of said Wil-
41 liams, and his said note for the sum of thirty thousand dollars, or either of them, are the note and deed set forth by the said complainant in her bill of complaint and by her claimed as a lien upon said lands and premises, these defendants require from her strict proof thereof; and the said defendants aver and say that the said deed and release to the said Dyer were to him actually and duly delivered by the said Jackson, and by the said Dyer knowingly and duly accepted; but the said defendants claim that the absence of such delivery and acceptance, or of either of them, could and would not bar, defeat, or cloud their title to said lands and premises as hereinafter set forth, or create any equity in these behalfs in favor of the said complainant as against these defendants.

That as to the averment in the said bill of complaint that the said release was neither executed nor acknowledged by the said Jackson until on or about the said 3rd day of August, A. D. 1872, these defendants are not informed and do not admit the same, but call for strict proof thereof from the said complainant, but they claim and insist that if the same was not by the said Jackson executed and acknowledged until the 3rd day of August, A. D. 1872, as alleged in the said bill of complaint, the same could and would not bar, defeat, or cloud the title of these defendants to the said lands and premises hereinafter set forth, or create any equity in these behalfs in favor of the said complainant as against these defendants.

That as to whether the signing, execution, and acknowledgment of the said release was an attempt to perpetrate a gross fraud, on
42 the part of and by the said Jackson, upon the alleged rights and equities of the said David Smith, as set forth in the said bill of

complaint, these defendants have never been informed save by the bill of complaint herein, but they believe said charge to be false and untrue and leave the complainant to her proof thereof, but they claim that if the said averment of the said bill in this behalf were true the same could and would not bar, defeat, or cloud the title of the said defendants to the said lands and premises hereinafter set forth, or create any equity in these behalfs in favor of the said complainant as against these defendants.

That as to the averments of the said bill that when the said release was so signed, executed, and acknowledged the said David Smith was then the legal holder and owner of the said alleged note for thirty thousand dollars, claimed by the said complainant to be a charge upon said lands and premises, and the possessor of the said alleged deed of trust alleged to have accompanied the said note; that the same and both of them were, by the said deed of the said Dyer to the said Jackson, then recognized of record as a valid and subsisting lien upon said lands and premises, to be paid by the said Jackson, these defendants neither admit nor deny the same, but require strict proof thereof in all and singular from the said complainant; but these defendants claim that if either or all of the averments of the said bill in these behalfs were true the same could and would not bar, defeat, or cloud their title to the said lands and premises hereinafter set forth, or create any equity
43 in these behalfs in favor of the said complainant as against the said defendants.

These defendants deny that the said release from the said Jackson to the said Dyer was executed without any good or valuable consideration in fact paid therefor, and aver the contrary, but they expressly deny that of the same all persons acquiring title under said Jackson to said lands and premises were bound to enquire into and ascertain at their peril; and in this behalf these defendants claim that if the averments of the said bill last above denied were true the same could and would not bar, defeat, or cloud their title to the said lands and premises hereinafter set forth, or create any equity in these behalfs in favor of the said complainant as against these defendants.

That as to the averments in the said bill of complaint touching the non-maturity of the said alleged note for thirty thousand dollars, and a reconveyance of said lands and premises from the said Jackson to the said Williams, these defendants neither admit nor deny the same, but leave the complainant to her proof thereof.

These defendants admit that on or about the 3rd day of August, A. D. 1872, there was filed in the said recorder's office of the said county of Cook a deed, dated the 1st day of June, A. D. 1872, made by the said Obadiah Jackson and his wife, and acknowledged on or about the 29th day of June, A. D. 1872, whereby they, after reciting an indebtedness to Joseph Swift of twenty-five thousand dollars, secured by the bond of said Obadiah Jackson to the said Swift, in the penal sum of
44 fifty thousand dollars, conditioned for the payment of the said sum of twenty-five thousand dollars on the first day of June, A. D. 1877, with interest at nine per centum per annum, payable semi-annually, and of an indebtedness to Edwin Swift of twenty-five thousand dollars, secured to be paid by the bond of the said Obadiah Jackson to the said Edwin Swift, in the penal sum of fifty thousand dollars, conditioned for the payment of the said sum of twenty-five thousand dollars on the first day of June, A. D. 1877, with interest at nine per centum per annum, payable semi-annually, did convey said lands and premises to Norman C. Perkins, (Henry Truman and Michael

W. Robinson, successors in trust), with covenants of warranty and power of sale of said lands and premises in case the said debts were not promptly paid according to the conditions of said bonds respectively.

And in this behalf these defendants aver and state that on or about the said first day of June, A. D. 1872, the said Obadiah Jackson became and was justly, & truly, and legally indebted to them each in the sum of twenty-five thousand dollars, for that amount of money then by each of them actually loaned and paid to the said Obadiah Jackson, at his request, which indebtedness is evidenced by the two bonds last above described, and that to secure the payment of the same the said Obadiah Jackson and A. Amelia, his wife, on or about the said first day of June, A. D. 1872, duly made, executed, and delivered their said certain deed last hereinbefore described, which said deed was duly acknowledged on or about the said 29th day of June, A. D. 1872, and on or about the said third day of August, A. D. 1872, duly re-
45 corded on, to wit, page of Cook of records, in and of the recorder's office for the said county of Cook, and State of Illinois.

That the said transaction of the said loan, and the execution of the said bonds and deed, were in all respects bona fide; that at the time and times thereof as hereinbefore stated, and at each and every of them, there were duly produced and delivered to these defendants full, true, perfect, and legal muniments of title, which showed that the said Obadiah Jackson was the legal and sole owner of said lands and premises in fee simple; that the said Jackson was then of record so shown to be the sole and legal owner of said lands and premises in fee simple; that the said Jackson at each and every of said times wherein he conveyed said lands and premises to these defendants as aforesaid, and prior thereto, was and had been the lawful owner thereof in fee simple absolute, by reason whereof it was not the duty of said defendants to take any notice of the terms of any prior deed of trust of said lands and premises to said Jackson that was then of record duly released, and they aver and say that by reason as aforesaid it would not so have been their duty if such prior deed of trust had not been of record duly released as aforesaid; that neither by said muniments of title, or any or either of them, nor of record, did there appear any notice of the claim of the said complainant to or upon the said lands and premises, as set forth in the said bill of complaint, or anything to put these defendants upon their inquiry in respect to the said claim of the said com-
46 plainant; that no notice of the said claim of the said complainant to the said lands and premises has ever come to the knowledge or suspicion of said defendants, or of either of them, until the filing of the bill of complaint herein.

That at the time and times of the said transactions of the said defendants with the said Jackson, as hereinbefore set forth, there appeared nothing of record touching the claim of the said complainant to said lands and premises as in said bill set forth, and nothing of record touching the alleged transactions, or either of them, had by the said complainant with the said Jackson as in said bill stated; nor nothing of record, or otherwise, to put these defendants upon their inquiry as to the same or any part thereof; that at the time and times of the said transactions of the said defendants with the said Obadiah Jackson, as aforesaid, the only deed of trust of said lands and premises from the said Williams to the said Jackson appeared of record duly and legally released.

And in these behalfs the said defendants claim and aver, and state that if it be true, as in said bill of complaint alleged, that the said Jack-

son became indebted to the said complainant for the sum of thirty-one thousand and five hundred dollars, or for any other sum, and that as security therefor the said complainant then became the owner and possessor of the said note and deed of trust of the said Williams, then it was the duty of the said complainant, in order to charge said lands and premises with the payment of the said Williams note, and to make it a lien thereon, to make, and she should have made her said alleged transactions with the said Jackson, and each and every of them,
47 whereby, as alleged, he became indebted to her as aforesaid, and wherein the said alleged transfer of the said Williams note and deed were made to her, a matter of record as a notice to subsequent claimants to said lands and premises, all and every of which the said complainant wholly failed to do, and the said defendants plead the same in bar as an estoppel to, upon, and against the said complainant and her claim in, to, and upon said lands and premises so far as these defendants are concerned.

That as to the averments of the said bill of complaint that the said Jackson, during the lifetime of the said David Smith, and afterwards, until the 26th day of October, A. D. 1876, kept paid the interest as it accrued on his own note to the said Smith; that the said note of the said Jackson had been extended from time to time after its maturity by the said David Smith during his lifetime, and afterwards by the said complainant; that at all of said times the said David Smith and the said complainant relied upon the said alleged note and trust deed of the said George N. Williams as collateral to the said note of the said Jackson, and as a good and valid security and a lien upon said lands and premises, and that the said David Smith and the said complainant, during the said times, did not know of the said release of the said Jackson to the said Dyer, or of the record thereof, and had no reason to suppose any such paper writing was in existence, these defendants have no knowledge or information sufficient to form a belief, and leave the complainant to her proof thereof; but they insist and claim that if any
48 or all of the said averments were true the same could and would not raise any equity in these behalfs in favor of the said complainant as against these defendants.

That as to the averments in the said bill of complaint that on the 26th day of October, A. D. 1876, the said Jackson paid the said complainant on account of interest on his note the sum of one thousand dollars, and promised to pay the residue due for interest for the extension of his said note in a short time; that soon after and after the 14th day of November, A. D. 1876, the fact of the making on or about that day of a certain deed of trust by the said Jackson to George Chandler first came to the knowledge of the said complainant; that she thereupon caused an examination of the record to be made and then first ascertained that the said release from the said Jackson to the said Dyer had been put upon record, that the said deed by the said Jackson and wife to the said Perkins had been made, and that any person was claiming that the said trust deed from the said Williams to the said Jackson had been released and discharged; that the said David Smith did not know during his lifetime that the said release by the said Jackson to the said Dyer had been made and recorded; that the said David Smith at all times after he received from the said Jackson the alleged note and trust deed made by the said Williams, treated the same as a good and valid lien upon said lands and premises, and relied thereon as such in making the said extensions to the said Jackson, these defendants have no knowledge or information sufficient to form a belief and leave the com-

plainant to her proof thereof; but they insist and claim that if
49 the said averments in all and in singular were true, the same could and would not create any equity in these behalfs in favor of the said complainant as against these defendants.

These defendants deny that it did not become necessary for the said David Smith or the said complainant to look to the said Williams for the payment of his said alleged note as set forth in said bill of complaint, and they aver, claim, and insist that the said David Smith and the said complainant have been guilty of great laches and negligence touching all the matters and things set forth in the said bill of complaint, and that the said complainant wholly fails to make any showing therein and thereby to entitle her to any relief from this honorable court.

These defendants admit the death of the said David Smith and the issue of letters of administration upon his estate at the respective times in said bill of complaint set forth, but as to whether among the effects and assets of the said deceased were the said alleged note of the said Williams and his said deed of trust to the said Jackson, these defendants neither admit nor deny the same, but require strict proof thereof from the said complainant.

That as to the averments of the said bill of complaint setting forth that the said complainant has taken the judicial proceedings therein stated against the said Jackson, that of him she has been unable to recover her just dues, and that he is now indebted to her in the sum
50 stated in said bill of complaint, these defendants have no knowledge or information sufficient to form a belief, and leave the complainant to her proof thereof; but they claim and insist that if the same in all and singular were true, the said complainant is not, by reason thereof, entitled to the relief prayed in the said bill of complaint, or to any part thereof, or to have any lien upon said lands and premises established in her behalf.

These defendants deny that they had any notice, either of record or otherwise, of the claims upon said lands and premises in said bill set forth. They deny that they had any notice, either of record or otherwise, that the said Jackson had executed a fraudulent release to the said Dyer touching said lands and premises, and they deny that any such fraudulent release was or has been executed.

These defendants deny that they had actual notice that the said release deed from the said Jackson to the said Dyer was never to him by the said Jackson delivered, and they deny that the said release deed was delivered to them, or either of them, by the said Jackson, but they claim and insist that if the contrary were true, the same could or would not bar, defeat, or cloud the title of the said defendants to the said lands and premises hereinbefore set forth, or create any equity touching the same in favor of the said complainant as against these defendants.

These defendants deny that they had notice of any fact or facts, thing or things, sufficient to put them upon the inquiry as to the claim of the said complainant in, to, or upon said lands and premises, and they deny that they are mala-fide purchasers of the same; but, on the contrary, aver and say, as hereinbefore alleged, that they are bona-fide
51 claimants of title thereto and thereof.

These defendants deny that they or either of them have ever had notice in any manner, shape, or form that the said alleged Williams note was due and has at all times remained wholly unpaid, except the interest thereon, up to the 17th day of May, A. D. 1871, as set forth in said bill of complaint. They deny that they or either of them have ever had any notice of any sort that the said alleged note of the said

Williams was held by the said David Smith in his lifetime; and subsequently, as the administratrix of his estate, by the said complainant, as collateral as aforesaid, or that the legal title thereto during all said times was vested in the said David Smith and the said complainant, successively; or that the said note was secured by the said Williams trust deed to the said Jackson and thereunder a lien upon said lands and premises. On the contrary, they aver and say that they and each of them, until the filing of the bill of complaint herein, were ever wholly ignorant of the said claims of the said complainant, as in this paragraph referred to, and they insist and claim that if the contrary were true, the same could and would not bar, defeat, or cloud their title to said lands and premises as hereinbefore set forth, or create any equity in these behalfs in favor of the said complainants as against these defendants.

That as to the averments in the said bill of complaint that these defendants had notice that the payment of the said alleged note of the said Williams had been assumed by the said Jackson, and that the said release from him to the said Dyer was without consideration, and
52 that said release, though dated the 2nd day of October, A. D. 1871, was not executed until the 3rd day of August, A. D. 1872, and never delivered to and accepted by the said Dyer at that time or at its pretended date, or at any time afterwards, and that it was executed, if at all, before the said Jackson had any authority so to do, and that he had no authority to release the same at any time save upon the payment of the said alleged Williams note to the said David Smith or the said complainant, these defendants expressly deny in all and in singular, and also expressly deny the truth of the statements in said averments contained, and aver that the contrary is the fact as is hereinbefore in detail expressly set forth; except as hereinbefore alleged, they are not informed as to the exact day when the said release from the said Jackson to the said Dyer was executed and acknowledged, and call for proof thereof; and these defendants claim and insist that if said averments and each and every of the statements thereof were true, the same could and would not bar, defeat, or cloud their title to said lands and premises hereinbefore set forth, or in any way create an equity in these behalfs in favor of the said complainant as against these defendants.

These defendants deny that there was collusion and conspiracy on the part of the said Jackson and Dyer touching the said release-deed of the said Jackson to the said Dyer; but they claim and insist that if the averment of the said bill in this regard were true, the same could and would not prejudice their rights and claims of title in and to said lands and premises as hereinbefore set forth, or create any equity in these behalfs in favor of the said complainant as against these defendants,
53 for they aver and say that until the filing of the said bill, they have had no notice in any manner, shape or form, of the claim of the said complainant that such collusion and conspiracy had existed, which claim they aver and say is wholly false and untrue.

That as to the knowledge charged against said Dyer touching the matters and things in said bill of complaint set forth, these defendants have never been informed thereof, save by the said bill of complaint, but they believe said charges and each and every of them false and untrue, and insist that if they were true, the same could and would not create any equity in these behalfs in favor of the said complainant as against these defendants.

These defendants deny that the said lands and premises are insufficient for the payment of the sum that the said complainant says is due her from the said Jackson, and they deny that she is entitled to the

possession of said premises and to the application of the rents, issues, and profits thereof to the payment of the same.

These defendants aver and say that said lands and premises are in the possession of a receiver, duly appointed by the superior court of the county of Cook and State of Illinois, and under bonds for the faithful performance of his duty, in the sum of twenty-five thousand dollars, who is collecting the rents and profits thereof for the benefit of such parties as said court shall declare to be lawfully entitled thereto; that said receiver has no authority to pay over said rents and profits, or any part thereof, save to keep the same property in repair and insured, except by order of said court; that these defendants are abundantly
54 able to respond in damages in a sum far greater than is claimed by the complainant in her bill of complaint, and that there is no danger but that the said lands and premises, or their full equivalent and value in money, will be forthcoming at the final determination of this controversy, to respond to and satisfy any decree that this honorable court may make in the premises.

The said defendants aver and say that they are bona fide the first incumbrances of record in, to, of, and upon said lands and premises, and that the said complainant, by reason of anything in her said bill of complaint contained, or otherwise, has no legal or equitable right, title, or interest thereon or thereto, or any part thereof, and that the said bill presents no equity in these behalfs in favor of the said complainant as against these defendants.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this, that there is any other matter, cause, or thing in the complainant's bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver and maintain and prove as this honorable court shall direct: and now, having fully answered, they pray to be hence dismissed with their reasonable charges and costs in these behalfs most wrongfully sustained.

EDWIN SWIFT,
JOSEPH SWIFT,
By GOUDY, CHANDLER & SKINNER.

55 GOUDY, CHANDLER & SKINNER,
Solicitors for said Swifts.

Answer of George Chandler.

STATE OF ILLINOIS, *ss:*

Circuit court of Cook County. In chancery.

JANET SMITH, ADMINISTRATRIX OF THE estate of David Smith, deceased,
v.
OBADIAH JACKSON, GEORGE N. WILLIAMS, Norman C. Perkins, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon; The Mutual Benefit Life Insurance Company of Newark, New Jersey; Eli F. Hollister, Selden H. Gorham; Nathan H. Walworth, receiver of the City National Bank; Franklin K. Orvis, J. L. Orvis, Isaac Meyer, Mayer Paliutski, Aaron Barnett, John J. Morgan, and Bernard Guisbury.

The answer of George Chandler to the complainant's bill of complaint herein.

This defendant, now and at all times hereafter, reserving to himself all manner of benefit and advantage of exception to the said bill of complaint by reason of the many imperfections and irregularities
56 therein contained, for answer to the said bill, or to so much thereof as the said defendant is advised it is necessary for him to make answer unto, answering says:

This defendant admits that the said Obadiah Jackson and A. Amelia Jackson, his wife, at or about the time or times in said bill of complaint set forth, made, executed, and delivered their certain deed, wherein and whereby they conveyed to this defendant, George Chandler, in trust, to secure the payment of the sum of fifty thousand dollars and upwards to Elizabeth and Ellen Carroll, defendants herein, the said lands and premises.

This defendant avers and says that he has no interest in this controversy, except as a trustee in and under the deed last hereinbefore set forth, and that except as hereinbefore pleaded he does not admit any of the allegations in said bill of complaint contained, but requires strict proof of each and every of the same.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

GOUDY, CHANDLER & SKINNER,
Solicitors for said Chandler.

Answer of Elizabeth and Ellen Carroll.

STATE OF ILLINOIS, *ss:*

Circuit court of Cook County. In chancery.

57 JANET SMITH, ADMINISTRATRIX OF the estate of David Smith, deceased,
v.
OBADIAH JACKSON, GEORGE N. WILLIAMS, Norman C. Perkins, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon; The Mutual Benefit Life Insurance Company of Newark, New Jersey; Eli F. Hollister, Selden H. Gorham; Nathan H. Walworth, receiver of the City National Bank; Franklin K. Orvis, J. L. Orvis, Isaac Meyer, Mayer Paliutski, Aaron Barnett, John J. Morgan, & Bernard Guisbury.

The joint and several answer of Elizabeth and Ellen Carroll to the complainant's bill of complaint herein.

These defendants, now and at all times hereafter reserving to themselves all manner of benefit and advantage of exception to the said bill of complaint by reason of the many imperfections and irregularities therein contained, for answer thereto, or to so much thereof as they are advised it is necessary for them to make answer unto, answering, say:

That they admit that on or about the third day of August, A. D. 1872, there was filed of record in the recorder's office of the county of Cook and State of Illinois, a deed dated on or about the first day of June, A. D. 1872, and acknowledged on or about the 29th day of
58 June, A. D. 1872, wherein and whereby the said defendant Obadiah Jackson conveyed to Norman C. Perkins in trust to secure the payment of the sum of fifty thousand dollars to the said defendants, Edwin and Joseph Swift, the following described lands and premises, to wit, lots fifteen (15) and sixteen (16) in block one hundred and eleven (111) in the school section addition to Chicago, but they deny that A. Amelia Jackson signed, executed, and acknowledged the said deed as in said bill set forth.

These defendants admit the said Obadiah Jackson and A. Amelia Jackson, his wife, at or about the time and times in said bill of complaint set forth, made, executed, and delivered their certain deeds wherein and whereby they conveyed to George Chandler, in trust to secure the payment of the sum of fifty thousand dollars and upwards to these defendants, the said lands and premises, and in this behalf these defendants aver and say that the said last named deed and each and both of them were duly made, executed, and delivered as aforesaid in consideration that the said Obadiah Jackson was then justly, truly, and legally indebted unto these defendants in the aforesaid sum of fifty thousand dollars and upwards for money to that amount theretofore actually had and received of them by the said Jackson. And they aver and say that they are bona fide the lawful holders of a second valid

lien and encumbrance of record upon said lands and premises for the said last named sum, to wit, fifty thousand dollars.

That as to all of the other averments in said bill of complaint contained, these defendants neither admit nor deny the same, or any of them, but in all and singular require strict proof thereof from the said
59 complainant; but they aver and say that there is nothing in said bill of complaint contained that if true would entitle the said complainant to the relief by said bill prayed, or any part thereof; on the contrary they insist that to grant the same either in whole or in any part would be entirely inequitable and unjust so far as these defendants are concerned.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged; without this, that there is any other matter, cause, or thing in the complainant's said bill of complaint contained, material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of those defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WM. J. CAMPBELL,
Sol'r for Elizabeth & Ellen Carroll.

And thereupon, on the 19th day of March, A. D. 1877, there was filed in said cause a certain answer of Norman C. Perkins and a certain publication, notice, and certificate of publication in words and
60 figures following, to wit:

STATE OF ILLINOIS, *ss:*

In the circuit court of Cook County. March term, A. D. 1877. In chancery.

JANET SMITH, ADM'X, &C., *vs.* NORMAN C. PERKINS ET AL.

The answer of Norman C. Perkins, one of the said defendants, to the bill of complaint herein.

The said defendant, Norman C. Perkins, reserving unto himself now and at all times hereafter all manner of benefit and advantage of exception to the many insufficiencies and irregularities in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is necessary for him to answer unto, answering, says:

That he has no interest herein except as trustee in the deed from the said defendant, Obadiah Jackson, and A. Amelia, his wife, to the said defendant to secure an indebtedness from the said Jackson to Edwin and Joseph Swift, defendants herein, in the sum of fifty thousand dollars, as in said bill of complaint set forth.

This defendant, further answering, says that he denies that a certain deed of release of the lands and premises in controversy herein made by the said Jackson to Charles V. Dyer as set forth in said bill of complaint was delivered to this defendant at the time of the making and

delivering to him of the said deed of the said Obadiah and A.
61 Amelia Jackson as hereinbefore set forth, and in this behalf this defendant avers and says that to him the said deed from the said Jackson to the said Dyer was never delivered, and that this defendant never filed the same for record.

Said defendant, further answering, says that except as aforesaid he neither admits nor denies the allegations in said bill of complaint contained or any or either of them, but requires strict proof thereof in all and singular of the said complainant.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by said bill charged; without this, that there is any other matter, cause, or thing in the complainant's bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

NORMAN C. PERKINS.

GOUDY, CHANDLER & SKINNER,
Sol'rs for said Perkins.

Publication notice.

(For publication notice see pages 31 and 32.)

62 *Publisher's certificate.*

This certifies, that a notice, of which the annexed printed slip is a true copy, was published for four successive weeks, to wit, four times in the daily edition of the Chicago Post, a newspaper published in the city of Chicago, of general circulation throughout Cook County, and the State of Illinois; that the date of the first paper containing the same was the twenty-second day of February, A. D. 1877; that the date of the last paper containing the same was the fifteenth day of March, A. D. 1877, and that we have received seven $\frac{20}{100}$ dollars for publishing the same.

Dated at Chicago, this 16th day of March, 1877.

[SEAL.] D. S. MCMUDLEN, *Publisher.*

And thereupon, on the 21st day of March, A. D. 1877, there issued out of said court, under the seal thereof, the people's pluries writ of summons directed to the sheriff of Cook County to execute, which said writ with the sheriff's return thereon endorsed is in words and figures following, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to the sheriff of said county, greeting:

We again command you that you summon John J. Morgan, George N. Williams, impleaded, &c., if he shall be found in your county, personally to be and appear before the circuit court of Cook County on the first day of the next term thereof, to be holden at the court-

63 house in Chicago, in said Cook County, on the third Monday of April next, to answer unto Janet Smith, administratrix of David Smith, deceased, in her certain bill of complaint filed in said court, on the chancery side thereof, against him & others. And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of said court, and the seal thereof, at Chicago, in said county, this 21 day of March, A. D. 1877.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed:)

The within named defendant not found in my county this 16th day of April, 1877.

CHARLES KERN, *Sheriff,*
By JOS. SCHOENINGER, *Deputy.*

P'd $1.00.

And thereupon, on the 22nd day of March, 1877, the following proceedings were had and entered of record in said cause, to wit:

JANET SMITH, ADMINISTRATRIX OF DAVID Smith, deceased, *vs.* NORMAN C. PERKINS ET AL. } 23438, 1692. Bill.

And now at this day comes the complainant by her solicitor, and it appearing to the court that due service of summons issued in this
64 cause has been had on Isaac Meyer, Bernard Guisbury, Mayer Palentski, Aaron Barnett; The Mutual Benefit Life Insurance Company of Newark, New Jersey; Eli F. Hollister, S. H. Gorham, Obadiah Jackson; Nathan H. Walworth, receiver of the City National Bank of Chicago, Illinois; Michael W. Robinson, Henry A. Gardner, Franklin K. Orris, John L. Orris, Henry Truman, Horace White, David Vernon, Charles V. Dyer, defendants therein named, ten days and upwards before the first day of this term, and the said last named defendants not having appeared and answered the bill of complaint in this cause, and being three times solemnly demanded come not, nor any for them, it is thereupon, on motion of said complainant, ordered that their default be and the same is hereby entered, and that the said bill of complaint be and the same is hereby taken as confessed against them.

And thereupon, on the 23rd day of March, A. D. 1877, there was filed in said cause a certain answer of Charles R. Carroll, and a certain order made and entered of record in said cause, which said answer and order are in the words and figures following, to wit:

STATE OF ILLINOIS, *ss:*

In the circuit court of Cook County. In chancery.

JANET SMITH, ADM'X, ETC., *vs.* NORMAN C. PERKINS ET AL.

65 The answer of Charles R. Carroll, an infant under the age of thirteen years, by his guardian ad litem, Edwin Stewart, to the bill of complaint herein.

This defendant, answering by his guardian ad litem, says that he is

an infant of the age of twelve years or thereabouts, and he therefore submits his rights and interests in the matter in question in this cause to the tender consideration and protection of this honorable court, and prays strict proof of the matters alleged in said bill of complaint.

CHARLES R. CARROLL,
By EDWIN STEWART,
His Guardian ad litem.

WM. J. CAMPBELL,
Sol'rs for said Guardian.

Order, March 23, 1877.

JANET SMITH, ADMINISURATRIX OF DAVID Smith, deceased,
vs.
NORMAN C. PERKINS ET AL.
} 23438, 1692. Bill.

On motion, it is ordered that said cause be and it hereby is referred to Henry Waller, esq., one of the masters in chancery of this court, to take proof of all the material allegations in the said bill contained and report the same to this court, with all convenient speed, without his opinion thereon.

And thereupon, on the 5th day of May, 1877, there was filed in said cause a certain affidavit in words and figures following, to wit:

66 STATE OF ILLINOIS,
County of Cook, ss:

Circuit court of Cook County. Chancery.

JANET SMITH, ADMINISTRATRIX,
v.
NORMAN C. PERKINS, TRUSTEE, ET AL.

Orrin Skinner, of the city of Chicago, in said county Cook, being duly sworn, deposes and says that he is one of the solicitors herein for Edwin and Joseph Swift, defendants in this cause; that a part of the subject-matter of this controversy are a supposed note and trust deed purporting to have been signed by one George N. Williams, upon which said note and trust deed the said complainant is herein seeking to establish a first lien of about thirty-one thousand dollars upon real property situate in the said city of Chicago, upon which the said defendants have loaned the sum of fifty thousand dollars, and to secure which a first deed of trust of said property was at the time of said loan duly made, executed, and delivered; that it is deponent's opinion absolutely essential for the protection of the said Swifts' interests herein to take the testimony of Charles C. Waite, now residing in the city of New York; that the said complainant, by her solicitor, has consented that the same may be done at the convenience of the said Swifts, as will be seen by a certain paper writing, a copy whereof is hereto attached and marked Exhibit A; that said note and deed, as deponent believes,
67 bear names that are wholly fictitious and spurious; that proof thereof, as deponent believes, is absolutely essential for the protection of the interests of the said Swifts herein; that the said Charles C. Waite, as deponent believes, can give testimony upon examination of

the said note and deed that will prove that some of the names to said note and deed are spurious and fictitious; that to take such testimony it is necessary to present the said note and deed to the said Charles C. Waite for inspection; that the said deponent has requested the said complainant's solicitor, Wm. T. Burgess, esq., who has the custody or control of said deed and note, for the purposes of this controversy to produce them, and each of them, on the 10th day of May instant, at two o'clock in the afternoon thereof, at the office of T. F. Wentworth, esq., No. 104 Broadway, in the city of New York, before whom and at which place and hour the said defendants, Edwin and Joseph Swift, desire to take the testimony herein of the said Charles C. Waite, and that so to do the said Burgess has in writing unqualifiedly refused.

ORRIN SKINNER.

Subscribed and sworn to before me this 8th day of May, A. D. 1877.
[NOTARIAL SEAL.] GEORGE CHANDLER,
Notary Public.

(Copy.)

LAW OFFICE OF W. T. BURGESS,
ROOM 35, NO. 97 CLARK STREET,
Chicago, May 3rd, 1877.

68 Messrs. GOUDY, CHANDLER & SKINNER,
Sol'rs, &c.:

GENTS: In the Smith v. Perkins case my client concludes not to be present at the examination C. C. & S. M. Waite, and consents that you may take them at your own convenience, reserving the right to send to them to answer written cross-interrogatories should we on inspection of the depositions conclude it is any object to do so.

Of course we expect that you will take them next week, and either return the depositions to the clerk or let us have a copy in ten days from to-day.

We are anxious to get this case to a hearing, & we should get it set. What time will suit you?

Yours, &c.,

W. T. BURGESS.

Exhibit A.

And thereupon, on the 7th and 21st days of May, 1877, the following proceedings were had and entered of record in said cause, to wit:

Order May 7th, 1877.

JANET SMITH, ADMINISTRATRIX,
v.
NORMAN C. PERKINS, TRUSTEE, ET AL. } 23438, 1692.

69 This cause having come on to be heard upon the application of Edwin and Joseph Swift, defendants herein, for an order directing the said complainant to produce in the city of New York, at the office of Thomas F. Wentworth, esquire, No. 104 Broadway, in said city, at 2 o'clock in the afternoon of each the 10th, 11th, and 12th days of May inst., a certain supposed note and deed of trust purporting to

have been signed, executed, and delivered by one George N. Williams for the inspection of Charles C. and Silas M. Waite, witnesses then and there to be examined on the part of said defendants, Edwin and Joseph Swift:

Now, upon all the papers and pleadings in this cause, and upon reading and filing the affidavit herein of Orrin Skinner, and it therefrom appearing to the court that to properly prepare for the hearing of this cause the said defendants, Edwin and Joseph Swift, are entitled to and have shown good cause for the production of said supposed note and deed of trust at the time and place aforesaid for the purposes hereinbefore set forth, it is hereby ordered, adjudged, and decreed that the said complainant, Janet Smith, administratrix as aforesaid, shall, and she is hereby ordered and decreed to produce and exhibit in the city of New York, at the office of Thomas F. Wentworth, esquire, No. 104 Broadway, in said city, at 2 o'clock in the afternoon of each the 10th, 11th, & 12th days of May instant, for exhibition to the said Charles C. and Silas M. Waite, witnesses, to *to* be then and there examined as aforesaid. the said supposed note and deed of trust, each of which purport to have
70 been signed, executed, and delivered by one George N. Williams, a copy of which said note has been filed in this cause as Exhibit 2, and which said deed has been filed in this cause as Exhibit 3, upon condition that the said defendants, Edwin and Joseph Swift, upon the entry of this order pay unto William T. Burgess, esquire, complainant's solicitor herein, the sum of ninety (90) dollars to defray the expenses of said production.

And it is hereby further ordered that a service of a certified copy of this order at any time prior to 3 o'clock of the afternoon of the 8th day of May instant, upon William T. Burgess, esquire, solicitor herein as aforesaid, shall be a due and sufficient service of this order upon the said complainant for all and singular the purposes herein before set forth.

Order May 21st, 1877.

JANET SMITH, ADMINISTRATRIX OF DAVID Smith, deceased,
vs.
NORMAN C. PERKINS ET AL. } 23438, 1692. Bill.

On filing due proof of notice to George N. Williams, one of the defendants herein, of the pendency of this suit by publication, according to the statute in such case made and provided, on motion, it is ordered that said defendant George N. Williams plead, answer, or demur to the bill of complaint in said cause instanter.

And said defendant, though solemnly called in open court, came not, but made default.

Whereupon, on motion, it is ordered that the complainant's bill of complaint be, and it hereby is, taken as confessed by said defendant George N. Williams.

71 And thereupon, on the 24th day of May, 1877, certain depositions of Charles C. and Silas M. Waite were filed in said cause in words and figures following, to wit:

LAW OFFICE OF W. T. BURGESS,
ROOM 35, NO. 97 CLARK STREET,
Chicago, May 3rd, 1877.

Messrs. GOUDY, CHANDLER & SKINNER,
Sol'rs, &c.:

GENTS: In the Smith v. Perkins case my client concludes not to be present at the examination C. C. & S. M. Waite, and consents that you may take them at your own convenience, reserving the right to send to them to answer written cross-interrogatories, should we, on inspection of the depositions, conclude it is any object to do so.

Of course we expect that you will take them next week, & either return the depositions to the clerk or let us have a copy in ten days from to-day.

We are anxious to get this case to a hearing, & we should get it set. What time will suit you?

Yours, &c.,

W. T. BURGESS.

Exhibit A.

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to Thomas F. Wentworth, esq., a notary public of the city, county, and State of New York, or to any other notary public of said county:

Whereas it has been represented to us that Charles C. Waite and Silas M. Waite are material witnesses in a certain cause now de-
72 pending in our circuit court of Cook County, in and for the county of Cook aforesaid, between Janet Smith, administratrix, &c., plaintiff, and Norman C. Perkins, trustee, et al., defendants, and that the said witnesses reside or are sojourning at New York aforesaid, without the said State of Illinois, and that their personal attendance cannot be procured at the trial of the said cause: Now know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witnesses, and do therefore authorize and require you to cause the said witnesses to come before you at No. 104 Broadway, in the city of New York, at 2 o'clock on the afternoon of each the 10th, 11th, & 12th days of May inst., and on the oath or affirmation of the said witnesses by you first duly in that behalf administered, faithfully to take the deposition of the said witnesses upon all interrogatories to be propounded to them orally, pursuant to the consent attached to these presents, on the part Edwin and Joseph Swift, defendants, and none others, and the same when thus taken, together with this commission and the said interrogatories, to certify into our said circuit court of Cook County, with the least possible delay.

Witness Jacob Gross, clerk of our said court, and seal thereof, at Chicago, in said county, this 5th day of May, A. D. 1877.

[SEAL.] JACOB GROSS,
Clerk.

Summons.

A commission having issued out of the circuit court of Cook
73 County, State of Illinois, directed to Thomas F. Wentworth, a notary public of the city, county, and State of New York, or to any other notary public of said county, to take your testimony in a certain ac-

tion now pending in said court between Janet Smith, administratrix, &c., plaintiff, and Norman C. Perkins, trustee, et al., defendants, you, Charles C. Waite and Silas M. Waite, are hereby summoned to appear and attend before George B. Ashley, esquire, a notary public of the county of New York, at the office of Thomas F. Wentworth, esq., No. 19 Broadway, in the city of New York, on the 10th day of May, 1877, at 2 o'clock in the afternoon thereof, and on the 11th & 12th days of May, 1877, at the same place and hour, to testify on behalf of Edwin and Joseph Swift, defendants.

For a failure to attend you will be punished according to law.

Witness the Hon. George M. Van Hoesen, justice of the court of common pleas in & for the city & county of New York, at the court-house, in the city of New York, on the 9th day of May, 1877.

GEORGE M. VAN HOESEN,
Judge New York Common Pleas.

GEORGE B. ASHLEY,
Notary Public N. Y. Co.

To CHARLES C. WAITE &
SILAS M. WAITE, Esq'r's.

The depositions of Charles C. Waite, of the city, county, and State of New York, and Silas N. Waite, of Brattleboro', Vermont (sojourning in the said city of New York), witnesses of lawful age, produced, sworn, and examined on their respective corporal oaths, the said Charles
74 C. Waite on the 11th day of May, 1877, at the office of Thomas F. Wentworth, esq., No. 19 Broadway, in the city, county, and State of New York, and the said Silas N. Waite on the 12th day of May, A. D. 1877, at the Brevoort House, Fifth Avenue, New York City, by me, a notary public in and for said city and county of New York, and commissioner duly appointed by a dedimus potestatem, or commission, issued out of the clerk's office of the circuit court of Cook County, in the State of Illinois, bearing teste in the name of Jacob Gross, esq., clerk of the said court, with the seal of said court affixed thereto, and addressed to Thomas F. Wentworth, a notary public of the city, county, and State of New York, or to any other notary public of said county, for the examination of the said Charles C. Waite and Silas N. Waite, witnesses in a certain suit and matter in controversy now pending and undetermined in the said circuit court wherein Janet Smith, administratrix, &c., is plaintiff, and Norman C. Perkins, trustee, et al., are defendants, in behalf of Edwin and Joseph Swift, defendants, upon oral interrogatories to be propounded to said witnesses.

The said Charles C. Waite and Silas N. Waite, being first duly sworn by me as witnesses in the said cause previous to the commencement of their examination, to testify the truth in relation to the matters in controversy between the said plaintiff and defendant, so far as he should be interrogated, testified and deposed as follows.

[NOTARIAL SEAL.] GEORGE B. ASHLEY,
Notary Public, N. Y. City & County, & Commissioner.

75 STATE OF ILLINOIS:

Circuit court of Cook County.

JANET SMITH, ADMINISTRATRIX, &C.,
vs.
NORMAN C. PERKINS, TRUSTEE, ET AL.

CHARLES C. WAITE, sworn on behalf of defendants Edwin and Joseph Swift, being examined by Mr. SKINNER, testifies as follows:

Q. Where do you reside?
A. New York City.
Q. How long have you lived here?
A. More than 10 years.
Q. Did you ever live in Chicago?
A. I did.
Q. When did you remove from Chicago?
A. In February, 1867.
Q. While living in Chicago, and when you left there, did you own any property on South Clark st.?
A. Yes, sir.
Q. What property?
A. Property known as the Lloyd House.
Q. That is the same property that is covered by this litigation?
A. I don't know anything about that.
Q. Where was the Lloyd House situated?
A. Corner of South Cook and Polk streets.
Q. Have you sold that property?
A. Yes, sir.
Q. To whom?
A. I don't know.
Q. When did you make the transfer of that property?
76 A. My impression is that it was in 1868—the fall of 1868.
Q. To whom did you make the deed?
A. Through Obadiah Jackson, but I have no recollection who it was sold to.
Q. State the history of the transaction.
A. It was nothing more than that it was sold by my attorney in Chicago, Obadiah Jackson, for which I received sundry notes. I am not clear whether there was any money at the time or not.
Q. Were you addressed by Mr. Jackson in the first instance about the sale of the property, or did you request him to sell it?
A. He was my attorney, and I from time to time requested him to sell it when he could. It was growing out of the correspondence that the property was sold.
Q. Correspondence between you and Mr. Jackson?
A. Yes, as my attorney.
Q. He sent you a letter saying he had been able to get a purchaser for the property?
A. That is my recollection.
Q. Did he have entire charge of the transaction?
A. Altogether; no one else.
Q. Did you visit Chicago when the sale was made?
A. No, sir.
Q. Did you have anything to do with the sale?
A. Nothing.

Q. Have you any of Mr. Jackson's letters that he wrote to you about the sale?

A. I don't think I have now. My business relations with Mr. Jackson terminated I think about that time, and I didn't keep the papers. I don't think I have any of his letters.

Q. When did you execute the deed transferring the property?

77 A. As far as my memory serves me it was here. It must have been here.

Q. Do you remember who was the grantee named in the deed?

A. No, sir.

Q. You simply executed the deed that Mr. Jackson sent you?

A. That is all. I think I went before some commissioner, but I can't tell because I haven't thought of it for years.

Q. Did you know anybody else in the transaction except Obadiah Jackson?

A. No, sir.

Q What considerations did you receive for the property when you executed the deed?

A. My impression is that the property was sold for $45,000.

Q. Cash paid you?

A. This note and other notes. I think there were some other notes. I am not positive whether there was any cash paid.

Q. What notes did you receive?

A. I received one note I think for $30,000, and another one I should think, if I recollect right, for $6,000. I think there was some money; I am not positive.

Counsel shows witness a paper purporting to be a note for $30,000, dated Chicago, October 1st, 1868, payable 4 months after said date, bearing the name as maker of George N. Williams, a copy of which said note has been put in evidence in the cause as Exhibit No. , and asks:

78 Q. Did you receive that note as part of the consideration for the sale of that property?

A. I think I did.

Q. When did this note first come into your possession?

A. I should say at about the time of its date.

Q. Did you then know the maker of this note, George N. Williams?

A. No, sir.

Q. Did you ever know such a man?

A. No, sir; I don't know him now.

Q. Was this note sent to you by Mr. Jackson?

A. Sent by mail, I think, by Mr. Jackson.

Q. As a part of the consideration for the sale of that property?

A. Yes, sir.

Q. Did Mr. Jackson make any statements to you about Mr. Williams at the time?

A. I don't recollect.

Q. You took this note upon Mr. Jackson's representations?

A. I believe the property secured it.

Q. You have no doubt you received this note from Mr. Jackson?

A. That is my memory.

Q. At the time you received this note from Mr. Jackson did you receive any deed of trust purporting to secure this note?

A. I should think so, though that is not in my memory.

Counsel shows witness a writing, endorsed George N. Williams to

Obadiah Jackson, use of Charles C. Waite, which is in evidence in the cause as Exhibit No. 3, and asks:

79 Q. Did you receive that from Mr. Jackson when you received Williams' note?

A. I have no means of knowing whether I did or not. There is none of my writing upon it.

Q. You say Mr. Jackson was acting as your attorney when this sale was made?

A. Yes. I had no reason to doubt his ability to hold a paper of that kind, and I think he held it.

Q. Did you ever have possession of it?

A. No, sir.

Q. You think it was left with Mr. Jackson?

A. I think so.

Q. Did you give Mr. Jackson any instructions in having this deed drawn as to who should be the trustee in it?

A. No, sir.

Q. You left those details altogether with him?

A. Yes, sir; altogether.

Q. You left the entire transaction with him?

A. Yes, sir.

Q. All you know was that you received $46,000, part notes and part money?

A. Yes, sir; Mr. Jackson, when I commenced to deal with him, was with McAllister, Jewett & Jackson; afterwards they divided, and it fell into Jackson's hands.

Q. You made no inquiries about this George N. Williams?

A. Not at all.

Q. How long did you hold this George N. Williams' note?

A. My impression is, a very short time. It may have been one or two months. I don't think I held it a month.

Q. What did you do with it?

A. I transferred it to my brother.

80 Q. Silas M. Waite?

A. Yes, sir.

Q. Did you receive any payment of interest on this note while you held it?

A. No, sir; I think not. Do you mean from Williams?

Q. Yes.

A. No, I think not.

Q. Do you know how long your brother held this note?

A. No, sir.

Q. Do you know what disposition he made of it?

A. My impression is he held it for some years.

Q. Your brother Silas M. Waite?

A. I think he did. I got that impression from conversations I had with him in which he said he was receiving payments on it slowly.

Q. According to your recollection you indorsed this note to your brother before the end of the year 1868?

A. That is my impression. I may be mistaken, because I didn't charge my mind with it at all.

Q. Do you know whether Obadiah Jackson ever bought this note of your brother Silas M. Waite?

A. I have no knowledge of the fact.

Q. There is nothing due you on this note now?

A. Nothing.

Q. There is nothing due you on account of the consideration for the sale of the property?

A. No, sir.

Q. Where was your brother Silas M. Waite living when you transferred this note to him?

A. Brattleboro', Vermont, where he is now.

CHARLES C. WAITE.

81 Q. State what money and what notes you received as a consideration for this property when you conveyed it.

A. One note of $6,000, one for $30,000, both, I think, signed by George N. Williams, and $10,000 in cash.

Q. From whom did you receive the notes and money?

A. From my attorney, Obadiah Jackson.

CHARLES C. WAITE.

STATE OF ILLINOIS:

Circuit court of Cook County. In chancery.

JANET SMITH, ADMINISTRATRIX, &C. }
vs.
NORMAN C. PERKINS, TRUSTEE, ET AL. }

SILAS M. WAITE, a witness sworn on behalf of the defendants Edwin and Joseph Swift, being examined by Mr. SKINNER, testified as follows:

Int. No. 1. What is your name, age, residence, and occupation?

Ans. My name is Silas M. Waite; am fifty-one years of age, and I reside at Brattleboro', Vermont, and am a banker.

Counsel shows witness a paper-writing purporting to be a note for $30,000, dated Chicago, October 1st, 1868, and bearing the name of George N. Williams as maker, and asks (a copy of which is in evidence in the cause as Exhibit No.):

Int. No. 2. Did you ever purchase that note? and, if so, from whom?

Ans. I must have had the note sometime, for it has my name
82 on it.

Int. No. 3. Was it transferred to you by your brother, Charles C. Waite?

Ans. I think it was.

Int. No. 4. When?

Ans. I cannot say.

Int. No. 5. Was it in 1868?

Ans. I don't know.

Int. No. 6. How long did you have the note in your possession?

Ans. I don't think I ever had it in my possession. My impression is that the note passed directly, with my indorsement, from my brother to Mr. Jackson.

Int. No. 7. When and where did you put your indorsement upon the note?

Ans. I think here. I can't say the exact time.

Int. No. 8. Was Mr. Jackson present at the time?

Ans. I think not.

Int. No. 9. Did you forward the note to Mr. Jackson?

Ans. I think not.

Int. No. 10. Did you ever sell this note to Mr. Jackson?

Ans. No, sir.

Int. No. 11. Have moneys ever been paid you on this note by Mr. Jackson?

Ans. Yes, sir.

Int. No. 12. To what amount?

Ans. It is impossible for me to say here.

Int. No. 13. Has he paid you the full face of the note?

Ans. I think not.

Int. No. 14. That portion of the note, as near as you remember, remains unpaid?

Ans. That is a question I can't answer. My papers and all of these matters are in the hands of Mr. Jackson, at Chicago, and I am
83 uncertain what amount remains unpaid.

Int. No. 15. This note was placed by you with Mr. Jackson for collection, simply, was it not, as your attorney?

Ans. Yes, sir.

Int. No. 16. You never sold it to him in any manner?

Ans. No, sir.

Int. No. 17. Has Mr. Jackson ever held this note except as your attorney for the purpose of collection?

Ans. No, sir.

Int. No. 17. What is the first name of the Mr. Jackson you have been speaking of?

Ans. Obadiah.

Int. No. 18. Have you ever had knowledge that Mr. Jackson had parted with or hypothecated this note?

Ans. No, sir.

Int. No. 19. Have you supposed, up to the present time, that this note was still in the possession of Mr. Jackson, as your attorney, to collect the same?

Ans. Yes, sir.

Counsel calls the attention of witness to the endorsement on said note directly over his name, in the following words, namely, "Pay to Obadiah Jackson or order," and asks—

Int. No. 20. Was that indorsement of "Pay to Obadiah Jackson or order" upon the note when you put your name there?

Ans. I don't think it was. His ink is on top of mine, and was written afterwards, of course, and is in different ink from what I used. I never sent that note endorsed to him in blank by mail, and I am now sure that I endorsed the note in his office, that is, in Mr. Jackson's office.

Int. No. 21. Was any conversation had by you and Mr. Jackson when you put your name upon the note; and, if so, what?

84 Ans. If I'm not mistaken, I endorsed that note with several other papers in Mr. Jackson's office, at Mr. Jackson's request. The note was transferred to me by my brother, and, as I remember it, when I handed the note to Mr. Jackson, he requested my indorsement, simply for the purpose of collection.

Int. No. 22. Have you ever asked Mr. Jackson for this note since the Chicago fire of October, 1871; and, if so, what did he tell you?

Ans. I asked him about the note in June, 1875. He said it was burned in the fire of 1871.

Int. No. 23. When was the last payment he made you on the note?

Ans. In the latter part of 1874.

SILAS M. WAITE.

I, George B. Ashley, of the city, county, and State of New York, a notary public in and for said city, county, and State of New York, duly commissioned, and commissioner duly appointed to take the depositions of the said Charles C. Waite and Silas N. Waite, witnesses whose names are subscribed to the foregoing depositions, do hereby certify that previous to the commencement of the examination of each of the said witnesses, Charles C. Waite and Silas N. Waite, as witnesses in the suit between the said Janet Smith, administratrix, &c., plaintiff, and the said Norman C. Perkins, trustee, et al., defendants, they and each of them were duly sworn by me as such notary public and commissioner, to testify the truth in relation to the matters in controversy between
85 the said Janet Smith, administratrix, &c., plaintiff, and the said Norman C. Perkins, trustee, et al., defendants, so far as they and each of them should be interrogated concerning the same; that the said deposition of the said Charles C. Waite was taken at the office of Thomas F. Wentworth, esq., No. 19 Broadway, in the said city, county, and State of New York, before me, by Mary E. Densmore, a disinterested person, under my direction, on the 11th day of May, A. D. 1877; that the said deposition of the said Silas N. Waite was taken by me at the Brevoort House on Fifth avenue, in the city, county, and State of New York, on the 12th day of May, A. D. 1877, and that after the said depositions were taken by said Mary E. Densmore and by me as aforesaid, the interrogatories and answers thereto as written down were read over by said witnesses, and that thereupon each of said depositions was signed and sworn to by said deponents before me, the oath being administered by me as such notary public and commissioner, at the places and on the days and year last aforesaid; and that said depositions were retained by me until sealed up and directed to the clerk of the circuit court, Cook County, Illinois.

[NOTARIAL SEAL.] GEORGE B. ASHLEY,
Notary Public, N. Y. City & County, & Commissioner.

STATE OF NEW YORK,
City & County of New York, ss:

I, Henry A. Gumbleton, clerk of the city and county of New
86 York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that George B. Ashley, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 22 day of May, 1877.

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

And thereupon, on the 7th day of June, 1877, there was filed in said cause a certain petition and bond for removal into the United States court, which said petition and bond are in the words and figures following, to wit:

STATE OF ILLINOIS, *ss*:

Circuit court of Cook County.

JANET SMITH, ADMINISTRATRIX, &C., }
v. }
NORMAN C. PERKINS, TRUSTEE, EDWIN SWIFT, }
Joseph Swift, et al. }

87 To the honorable the judges of the said circuit court:

Your petitioners, Edwin and Joseph Swift, respectfully show that they are two of the defendants in this suit which was brought by the said complainant in the said court on or about the 29th day of January, A. D. 1877; that the said complainant at the time of the commencement of this suit was, ever since has been, and now is a citizen of the State of Illinois and a resident of the northern district thereof; that your petitioners, at the time of the commencement of the said suit, were each, and both of them ever since have been, and now are citizens of the State of Pennsylvania; that the matter here in dispute between the said complainant and your petitioners amounts to the sum of thirty thousand dollars and upwards, exclusive of costs; that the nature of this controversy between the said complainant and your petitioners is as follows, namely: The said complainant claims to be the legal holder of a note purporting to have been made by George N. Williams for about the sum of thirty thousand dollars, which said note the said complainant claims to be secured by a certain deed of trust purporting to have been made by the said Williams, whereby certain lands and premises in the city of Chicago, State of Illinois, are assumed to have been conveyed in trust to secure the payment of the said supposed Williams note; your petitioners are the legal holders and owners, moreover, of two certain bonds duly made, executed, and delivered by Obadiah Jackson, of the said city of Chicago, each in the penal sum of fifty thousand dollars, the payment whereof is secured by a certain deed of trust of the same said lands and premises duly
88 made, executed, and delivered by the said Obadiah Jackson and A. Amelia Jackson, his wife, which said last named deed is a valid first lien and encumbrance of record thereon, and this suit is brought by the said complainant, among other things, to have the said supposed Williams note adjudged and decreed to be a valid first lien and charge upon said lands and premises; that all of the other defendants hereto are creditors of Obadiah Jackson, who are in no way interested in or connected with the said controversy between the said complainant and your petitioners; that all of said defendants save Elizabeth & Ellen Carroll and Norman C. Perkins, trustee, and George Chandler, trustee, have been defaulted, and the bill as to them stands as confessed; that said Perkins and Chandler have no interest in the controversy and are mere trustees in the said deeds of trust; that the interest of the said Carrolls is that of creditors of the said Jackson, whose claim against him is secured by a deed of trust of said premises to said Chandler bearing date later than the said deed under which the said complainant and your petitioners claim; that said controversy is wholly between the said complainant and your petitioners, and that this suit is one in which there can be a final determination of said controversy, so far as it concerns your petitioners, without the presence of the other defendants as parties in the cause; that this suit has not been tried; that it is not yet ready for trial; that no replications have yet been filed; that proofs are being taken and are not yet closed; that there

has been no term of this court since the commencement of this
89 suit at which it could have been tried, and that it cannot be heard or tried at the present May term of this court; that said suit is now awaiting a hearing and trial in the said circuit court of Cook County, in the State of Illinois, and your petitioners desire to remove this suit before the trial thereof into the next circuit court of the United States to be held in the northern district of Illinois, in the seventh circuit, in pursuance of the provisions of law as contained in the act of Congress approved on the 3rd day of March, A. D. 1875, entitled "An act to determine the jurisdiction of circuit court of the United States, and to regulate the removal of causes from State courts, and for other purposes."

And your petitioners are ready and willing to give such good and sufficient surety as this court may direct for their doing all acts and things required to be done by the said provisions of law, upon the removal of a suit into the United States court, and they offer herewith a bond executed by Horace A. Hurlbut, of the said city of Chicago, as principal, and by William C. Goudy, of said city, as surety, in the penal sum of five hundred dollars, conditioned that your petitioners shall enter in the next circuit court of the United States to be held in the northern district of Illinois, in the seventh circuit, on the first day of its said session, full and true copies of all process, pleadings, depositions, testimony, and other proceedings in this suit and doing such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit into the United States court.

And your petitioners therefore pray that the said bond may be accepted as good and sufficient surety, according to the said pro-
90 visions of law, and that the said suit may be removed into the next circuit court of the United States to be held in the northern district of Illinois, in the seventh circuit, pursuant to the said statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court. And your petitioners will ever pray, etc.

EDWIN SWIFT,
JOSEPH SWIFT,
By GOUDY, CHANDLER & SKINNER,
Their Attorneys.

STATE OF ILLINOIS,
County of Cook, ss:

Horace A. Hurlbut, of the city of Chicago, in said county, being duly sworn, deposes and says that he is the agent and attorney in fact in said city and county for the said petitioners, Edwin & Joseph Swift, who are each and both non-residents of the State of Illinois; that he has read the foregoing petition, and the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to these he believes the same to be true.

HORACE A. HURLBUT.

Sworn to before me this day of June, A. D. 1877.

Bond.

STATE OF ILLINOIS, *ss:*

Circuit court of Cook County.

91 JANET SMITH, ADMINISTRATRIX, &C.,
vs.
NORMAN C. PERKINS, TRUSTEE, EDWIN SWIFT, Joseph Swift, et al.

We, Horace A. Hurlbut, as principal, and William C. Goudy, as surety, both of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto Janet Smith, administratrix, &c., of Evanston, in said State, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Janet Smith, administratrix, &c., her successors or assigns; for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated the 6th day of June, A. D. 1877.

The condition of this obligation is such, that if Edwin & Joseph Swift, two of the defendants herein, who have filed their petition in the said circuit court of Cook County for the removal of this suit into the next circuit court of the United States to be holden in the northern district of Illinois, in the seventh circuit, in pursuance of a certain act of Congress in said petition more fully set forth, and approved on the 3d day of March, A. D. 1875, or their legal representatives, shall enter or cause to be entered in the said last-named court, on the first day of its stated session next ensuing after an order of the said circuit court of Cook County shall have been entered for the removal of said suit
92 into the said United States circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do or cause to be done such other appropriate acts as by the said act of Congress, approved on the 3rd day of March, A. D. 1875, are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue.

HORACE A. HURLBUT. [SEAL.]
W. C. GOUDY. [SEAL.]

And thereupon, on the 14th day of June, 1877, the following proceedings were had and entered of record in said cause, to wit:

JANET SMITH, ADMINISTRATRIX OF DAVID SMITH, deceased,
vs.
NORMAN C. PERKINS, TRUSTEE, EDWIN SWIFT, Joseph Swift, Obadiah Jackson, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company of Newark, New Jersey;
93 Eli F. Hollister, S. Gorham, Nathan H. Walworth, receiver of the City National Bank; Franklin K. Orvis, John L. Orvis, Isaac Meyer, Aaron Barnett, Mayer Paliutski, John J. Morgan, Bernard Giusbury, and George N. Williams. } 23438, 1692. Bill.

Upon reading and filing the petition of the above-named Edwin and

Joseph Swift, defendants herein, for the removal of this suit into the circuit court of the United States for the northern district of Illinois in the seventh circuit, and also upon reading and filing a notice of motion duly served upon the solicitor of the said complainant for an order of this court directing such removal, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and upon approving and filing the security offered by said defendants according to the requirements of said laws, and on motion of Goudy, Chandler, and Skinner, solicitors for the said defendants Swifts, the said complainant not appearing either in person or by her attorney or solicitor, it is hereby ordered that the said security be accepted, and the said suit be removed into the next circuit court of the United States to be held in and for the northern district of Illinois in the seventh circuit, and that no further proceedings be had in said suit in this court.

Witness the honorable William W. Farwell, chief justice of said circuit court of Cook County, in the State of Illinois, and the seal thereof, this 14th day of June, A. D. 1877.

94 And thereupon, on the 21st day of June, A. D. 1877, there was filed in said cause certain evidence taken before a master in chancery, in words and figures following, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

Circuit court of Cook County. In chancery.

JANET SMITH, ADMINISTRATRIX OF DAVID SMITH, dec'd, complainant,
vs.
NORMAN C. PERKINS, OBADIAH JACKSON, GEORGE N. WILLIAMS, JOSEPH SWIFT, EDWIN SWIFT, GEORGE CHANDLER, ELLEN CARROLL, ELIZABETH CARROLL, CHARLES R. CARROLL, HENRY A. GARDNER, HENRY TRUMAN, MICHAEL W. ROBINSON, CHARLES V. DYER, HORACE WHITE, DAVID VERNON, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY; ELI F. HOLLISTER, S. R. GORHAM, NATHAN H. WALWORTH, receiver of the City National Bank; FRANKLIN R. ORVIS, J. L. ORVIS, ISAAC MEYER, MAYER PALIUTSKI, AARON BARNETT, JOHN J. MORGAN, BERNARD GIUSBURY, defendants.

95 The depositions of witnesses produced, sworn, and examined on the part of the complainant and defendants in the above-entitled cause, taken before me, Henry Waller, one of the masters in chancery of the circuit court of Cook County, at my office in Chicago (except in case of Charles V. Dyer, whose deposition taken at his residence by agreement of parties), on the 4th day of April, A. D. 1877, and on the several days thereafter as noted, pursuant to an order of reference heretofore entered in said cause; the complainant appearing by her solicitors, W. T. Burgess, esq., and Hon. Van H. Higgins, and the defendants, Joseph Swift and Edwin Swift by their solicitor, Orrin Skinner, esq.

GEORGE WATSON, a witness produced, sworn, and examined on the part of the complainant, deposes and says:

George Watson.

Int. 1. What is your name, age, residence, and occupation?

Ans. My name is George Watson; my age, 54 years; residence, Evanston, Cook County, Illinois; am not engaged in any special business, but am local director of the Bank of Montreal.

Int. 2. Did you know David Smith in his lifetime; is he now living; if not, when did he die?

Ans. I did; he is dead; he died in February, 1874; he was my brother-in-law.

Int. 3. Look at the paper-writing now shown you, and of which a copy, marked Exhibit No. 1, is attached to your deposition, and state if you know the subscribing witness to the execution thereof.

96 (The defendants' counsel consents that the copy of the said paper be received in evidence in lieu of the original without objection as to form, and complainant's solicitor agrees that the said original shall be produced upon the hearing.)

Ans. I do, it is myself; George Watson; in my handwriting.

Int. 4. What papers were received by said David Smith, the payee of said note, in connection with, and at the time of the execution of the note made by said Obadiah Jackson, one of the defendants in this suit?

Ans. George N. Williams' note dated October 1st, 1868, for $30,000, was delivered.

Int. 5. Look at the paper writing now shown you, of which, with the endorsements thereon, Exhibit No. 2, attached to your deposition, is a copy, and state whether or not that is the note you have alluded to above, as made by George N. Williams?

Ans. It is.

(The said copy of the said note is put in evidence without objection as to form by the defendants' counsel and the complainant's counsel agrees that the original shall be produced at the hearing.)

Int. 6. Look at the paper writing produced by the complainant's counsel, marked Exhibit No. 3, in the cause, being a trust deed purporting to be signed by George A. Williams, and to be dated 1st day of October, 1868, and state what, if anything, you recollect or know about its coming into the possession of said David Smith?

(Defendants' counsel objects to the question, it being leading.)

97 Ans. My recollection is that it came into his possession at the same time as the other two papers above mentioned.

Int. 6. What had you to do with the matters out of which the note made by Obadiah Jackson, of which Exhibit No. 1 is a copy, came to be made?

(Objected to as leading by defendants' counsel, and also as irrelevant.)

Ans. I assisted David Smith to negotiate the loan, examine the securities on which it was based, going to the property, and passed my opinion as to the soundness of the transaction, and the securities connected therewith.

Int. 8. What were the securities on which it was based?

Ans. A note signed by George N. Williams for $30,000, dated October 1st, 1868, payable to the order of Charles T. Waite, and endorsed by him; the payment of said note being secured by a trust deed made by said George N. Williams to Obadiah Jackson, to the use of Charles C. Waite; these being the papers heretofore described in this deposition.

Int. 9. In whose possession, after the transaction you have just alluded to, to the present time, have the three documents, Exhibit No. 3

and those of which Exhibit Nos. 1 and 2 are copies, respectively, remained?

Ans. For two or three years after the negotiation above set forth they were left in the safe-keeping of Mr. John Watson and myself.

Int. 10. Did you make any examination of the papers of David Smith, after his death; and, if so, where did you find the original documents alluded to in the last preceeding question?

Ans. I did not; I have casually seen the papers since.

98 Int. 11. Will you state at length, so far as you know, the circumstances under which this note, made by Obadiah Jackson, was given, and the accompanying note and trust deed of George N. Williams was pledged as security?

Ans. George Armour, Wesley Munger, and myself were executors of the estate of the late George Steele, who owned a piece of property on the northwest corner of Jefferson and West Randolph street; after getting through with trust, that property with others was handed over to George Steele's heirs. They sold that property to Obadiah Jackson and Rice, I believe, for I believe $41,500, giving their note for $31,500, secured on that property by trust deed, as part payment of the purchase money; that note for $31,500 I purchased from the heirs of Steele for my brother-in-law, Mr. David Smith. When that note came due Mr. Obadiah Jackson came to me and suggested that he could not pay it in cash, but wanted to negotiate for it, which I consented to on behalf of Mr. David Smith, and we consented, taking in payment therefor Mr. Obadiah Jackson's note of $31,500—this note exhibited here—and as collateral security for the same, George N. Williams' note of $30,000. At the time that I took these securities Mr. Jackson furnished me with a trust deed securing the payment of that $30,000 note on some property on South Clark street, also furnishing me with an abstract of title of the property, so as to satisfy myself that the note was well secured; I had the same examined by my attorney, and, being satisfied, we took it.

99 Int. 12. Did you release the security that you held for the note that you had purchased from the Steele heirs on taking this security?

Ans. That note was given up to Mr. Jackson in lieu of the $31,500 note here in controversy, and this collateral security, this Williams note, we gave him up his note.

Int. 13. (Handing witness paper.) Look at the original of which Exhibit No. is a copy, and state what endorsements were upon it at the time you received it as you have above stated.

Ans. The endorsement of Silas W. Waite, Charles C. Waite, and Obadiah Jackson were upon the note at the time that it was taken by me for Mr. Smith, and my recollection that most of the other endorsements on the back of it, if not all, were on it; the original $31,500 note was given up and another note of an equal amount was taken with this George N. Williams' note as collateral security. The trust deed and the abstract were furnished to us to look into them and investigate whether the title was good.

Int. 14. What do you know in reference to the payment of the interest by Jackson upon the note given by him?

Ans. Nothing, unless by seeing the endorsements on it and my brother and Mr. Smith's statements from time to time.

Cross-examination by Mr. SKINNER:

Int. 15. When you took the Williams note of Jackson what note did you surrender to Jackson?

Ans. A note of $31,500 of Jackson's that was bought from the heirs of Steele, secured on a piece of property on the northwest corner of Jefferson and Randolph streets.

100 Int. 16. You surrendered a note made by Obadiah Jackson for $31,500?

Ans. Yes, sir.

Int. 17. How did you get possession of that note?

Ans. It was bought by me for my brother-in-law from the Steele heirs.

Int. 18. It was bought by you with funds of David Smith, deceased?

Ans. It was bought by me with funds of David Smith, deceased.

Int. 19. Then the transaction in which the Jackson note for $31,500 was surrendered, and the Williams note was taken, was made by you for David Smith and not for yourself?

Ans. I made the transaction for David Smith and not for myself. I had no more interest in it, any more than looking after his interests.

Int. 20. You conducted that transaction and that negotiation entirely, did you not?

Ans. Yes, sir; by and with my brother-in-law's consent at the time.

Int. 21. David Smith's consent?

Ans. Yes, sir; David Smith's consent.

Int. 22. You acted for him at his request?

Ans. Yes, sir; I acted for him at his request.

Int. 23. And had charge of the entire business?

Ans. Yes, sir; I had charge of the entire business.

Counsel shows witness note purporting to be signed by George N. Williams and asks:

Int. 24. Was the name of Obadiah Jackson that is now endorsed on the note there when you took this note?

Ans. It was.

101 Int. 25. Was any one associated with you or acting with you, in the transaction by which this Williams note was taken for the one that was surrendered to Jackson, except Mr. Smith?

Ans. No one associated with me in the transaction. I haven't any doubt I consulted my brother, in whose office I kept a desk.

Int. 26. At the time, did you make any inquiry of Mr. Jackson as to who owned this land that is described in the trust-deed purporting to secure the Williams note?

Ans. Through the abstract.

Int. 27. Did you make any inquiry of Mr. Jackson about it?

Ans. I don't recollect so fine a detail as that. My impression is I did.

Int. 28. What did he say about it?

Ans. I can't go into that detail at the moment.

Int. 29. Did you make any inquiry of anybody, aside from an examination of the abstract of title, as to who owned the land mentioned in the trust-deed purporting to secure the Williams note?

A. My impression is, not unless from Mr. Jackson and the abstract and trust-deed.

Int. 30. At the time, did anybody tell you who owned the land?

A. I have no recollection of that.

Int. 31. And you don't remember that you made any inquiry?

A. I went down and saw the property and examined it, and looked over the abstract, and had my attorney do so.

Int. 32. As a matter of fact, did you know that Mary T. Moody had the fee of the land at that time?

A. I don't recollect at the moment, although I have seen her name in connection with that.

102 Int. 33. You have no recollection of making any inquiry of anybody, unless it may have been of Mr. Jackson, as to who owned the land at the time?

Ans. Yes, sir; and through the abstract.

Int. 34. You don't recollect that any statements were made to you by any parties as to who owned the land?

A. I have no recollection.

Int. 35. When you and Mr. Jackson conducted this negotiation, did you inquire of Mr. Jackson whether he owned this George N. Williams note?

A. I don't recollect any particular conversation as to that.

Int. 36. Was anything said by Jackson as to whether he owned the George N. Williams note?

A. I don't recollect.

Int. 37. You made the transaction believing the George N. Williams note to be owned by somebody, and by Jackson, through the abstract?

The abstract showed that there was such a note in existence, and on that property.

Int. 38. Did the abstract show that Obadiah Jackson was the holder or owner of the George N. Williams note at the time you negotiated it?

Ans. I don't recollect that particularly at the moment.

Int. 39. At the time you made the negotiation, did you ascertain who was the legal holder and owner of the George N. Williams note?

Ans. I don't know that I went into these particulars.

Int. 40. Do you recollect whom you believed owned the George N. Williams note at the time you made the transaction?

Ans. I certainly believed that Obadiah Jackson owned it.

Int. 41. Did he tell you he did?

Ans. I don't recollect whether he, in that form, did or not.

103 Int. 42. Did you make any inquiry of Mr. Jackson, or of anybody else, at the time, as to who George N. Williams was?

Ans. I have no recollection at the moment of that.

Int. 43. Did you make any investigation at the time as to who George N. Williams was?

Ans. I investigated through the trust deed and the abstract, and went and looked at the property.

Int. 44. That is not an answer to the question.

Int. 45. At the time you made this negotiation with Mr. Jackson, when you took this George N. Williams note and surrendered to Jackson his, did you make any effort to ascertain who George N. Williams was?

Ans. I have no recollection of doing so.

Int. 46. Did you ever know of such a man as George N. Williams?

Ans. I—yes; I have known two of them.

Int. 47. Are either of those two the maker of this note?

Ans. I think not.

Int. 48. Did you make any inquiry at the time of this transaction as to the commercial credit of the maker of this note—this George N. Williams?

Ans. Not that I recollect of.

Int. 49. Do you know the George N. Williams whose name appears at the end of this note?

Ans. I do not.

Int. 50. Did you ever know him?

Ans. Not to my knowledge.

Int. 51. Was there any assignment of this note made to you, except its delivery to you by Mr. Jackson?

A. I think not.

Int. 52. Did he put his name upon the back of the note, at the time he delivered it to you?

104 Ans. It was on the back of the note, according to my recollection, at the time it was presented to me.

Int. 53. Did you ask Mr. Jackson for any assignment of the note other than its manual delivery?

Ans. My recollection is, I asked for nothing but the trust-deed by which it was secured, and the abstract covering the ground on which it was secured.

Int. 54. And the note?

Ans. And the note.

Int. 55. Simply that they be delivered to you?

Ans. Yes, sir.

Int. 56. Did you examine the trust deed?

Ans. My recollection is that I did; in fact, I always examine those things myself.

Int. 57. At the time of the negotiation, when you examined the trust deed, you saw and knew that Obadiah Jackson was the trustee named in that trust-deed, did you not?

Ans. I presume so.

Int. 58. You have no doubt of it, have you?

Ans. None whatever.

Int. 59. You say that you made this transaction, assuming that Obadiah Jackson was the owner of the Williams note?

Ans. I did.

Int. 60. And you also say that at the time you knew he was the trustee named in this trust deed that purports to secure the Williams note?

Ans. I haven't any doubt about that.

Int. 61. And at the time you required no papers of Mr. Jackson by way of assignment in any manner, shape, or form, except the mere delivery of the abstract of title, the trust deed, and the Williams note?

Ans. With his own.

Int. 62. That was all?

105 Ans. That is my recollection.

Int. 63. When the transaction was concluded, what did you do with the Jackson note, the Williams note, and the Williams trust deed?

Ans. My recollection is that they were kept in my own safe, for safe keeping for my brother-in-law, for some time.

Int. 64. Until his death?

Ans. No; I was away; no, not so far as I was concerned.

Int. 65. When did they go out of your possession?

Ans. I don't recollect that exactly.

Int. 66. Before the death of David Smith, did you surrender to him the George N. Williams note, the Williams trust deed, and the Jackson note? Did you give them to him?

Ans. My impression is we held them on his behalf—held them in our safe on his behalf until such time as the fire took place.

Int. 67. That is at the time of the big fire?

Ans. Yes, sir.

Int. 68. Where were they at the time of the big fire?

Ans. My recollection is they were on my brother's back, being carried out to Evanston.

Int. 69. After the fire, what was done with them?

Ans. I don't recollect as well after that how the thing went; I am a little mixed about it.

Int. 70. Where were they at the time of Mr. Smith's death?

Ans. I don't know.

Int. 71. When did you first see them after Mr. Smith's death?

Ans. I don't think I have seen them until within a few months.

Int. 72. Since Mr. Smith's death?

Ans. Yes, sir.

Int. 73. When did you first see them after his death?

Ans. I can't recollect whether it was my sister-in-law, or my nephew here, in his hands.

106 Int. 74. He came and showed them to you?

Ans. Yes, sir; but I have seen them.

Int. 75. Since October last?

Ans. I, yes.

Int. 76. Did you see the notes and deed at all, after Mr. Smith's death, before last October?

Ans. My recollection is, that after his death, when they went into court to settle his estate, I saw them from time to time. That is my recollection at the moment.

Int. 77. You have had no control over them since the fire?

Ans. None.

Counsel shows witness George N. Williams' note in question and asks:

Int. 78. When you took this note of Mr. Jackson, were there then upon the back of the note the following words that now appear there: "Pay to Obadiah Jackson or order. S. M. Waite."

Ans. That is my impression.

Int. 79. Have you any recollection about it?

Ans. In looking at the note, I say that they were there.

Int. 80. And you have no doubt that you knew, at the time, that Mr. Jackson was the trustee named in the George N. Williams trust deed?

Ans. That is my impression from having examined the note, the trust deed, and the abstract.

Int. 81. And you are equally clear that you made no investigation as to who owned the land then?

Ans. So far as that is concerned, from Mr. Jackson and his abstracts, I was aware at the time—I must have been aware at the time, from having examined the abstract, who the owner was to whom the property belonged on which the note was secured.

107 Int. 82. But you didn't call upon the owner, upon seeing the abstract, and make any inquiry about the matter?

Ans. I believe not.

Int. 83. Nor you didn't have anybody call upon the owner?

Ans. I think not.

Int. 84. And you are sure that you made no inquiry at the time as to who owned the Williams note?

Ans. My impression is that I took it for granted that it belonged to Obadiah Jackson and made no further inquiry.

Redirect examination by Mr. BURGESS:

Int. 85. What was the character and the standing, professional and financial, of Obadiah Jackson, at the time you took this note for $31,500?

Ans. My impression is that he was a man of high standing in society,

and a man of large means—property; that I had known him for years and years, and his father before him; I lived in that neighborhood for years, in which he lived on the north side.

Mr. VAN HIGGINS:

Int. 86. You never heard a rumor of anything crooked against him?
Ans. I never heard a rumor of anything crooked against him.

Mr. BURGESS:

Int. 87. Is this Jackson note for $31,500 dated at the time when the transaction took place?

Mr. BURGESS:

Counsel for complainant call upon counsel for the defendants
108 to produce deed from Waite to Mary T. Moody, from Mary T. Moody to Charles V. Dyer, and from Charles V. Dyer to Obadiah Jackson; otherwise the complainant will put in secondary evidence of the contents.

It is agreed by and between counsel that Exhibit No. 3, in this cause, to wit, a paper writing and endorsed "George N. Williams to Obadiah Jackson, use of Charles V. Waite, trustee," may be retained by the complainant's counsel, and that the original shall be produced upon the hearing.

MONDAY, *April* 9, 1877.

Parties met pursuant to adjournment, whereupon the cross-examination of GEORGE WATSON was resumed by Mr. SKINNER as follows:

Int. 88. (Counsel shows witness the note that has been put in evidence in this case, purporting to be signed "George N. Williams," and asks:) When did you receive this note from Mr. Jackson for Mr. Smith?

A. It was given as collateral when I received Obadiah Jackson's note for $31,500.

Int. 89. Q. Do you remember the date?

A. Only from the note itself.

Int. 90. Q. Which note?

A. Jackson's note of $31,500.

Int. 91. Q. What is the date of the note?

109 A. April 18th, if I recollect now. April 18, 1871.

Int. 92. Q. Now look at the Williams note; I will direct your attention to the endorsement on the back of it. State whether, when you took that Williams note from Jackson, all these endorsements were on it?

A. I can't swear as to that positively; but my impression is, if not all, the most of them were on. I recollect that there were quite a number of endorsements on it when I got it.

Int. 93. Q. You had this Williams note for some little time after you took it from Jackson for Smith, did not you?

A. No, sir.

Int. 94. Q. Who did have it?

A. My brother, I believe.

Int. 95. Q. What is your brother's name?

A. John.

Int. 96. Q. Where did he have it?

A. Well, on that point, let me see. I said something the other day on that point. I think I made a mistake when you brought that up. My belief, at present, is that after it was discounted it was kept in my brother's inside vault until the fire took place.

Int. 97. Q. Who put it there?

A. If anybody did, he.

Int. 98. Q. Who did you give it to, after you took it from Jackson?

A. I am not positive whether I handed it to Mr. Smith and he handed it to my brother, or got it in that way; but those are my impressions at the moment; and I may further say, in connection with that, that in swearing, the other day, in reference to this subject, I talked as if my brother had had control of that note for two or three years after
110 it was discounted. My impressions are now at the time of the fire it was placed by my brother in the Safety Deposit Company, or he so informed me—kept his papers there—at the fire we saved all our papers.

Int. 99. Q. Mr. Watson, you have testified that you received this Williams note from Jackson about the 18th of April, 1871?

A. About that time.

Int. 100. Q. Now look at this last endorsement upon the back of this note, which reads thus: "S. M. Waite by O. Jackson." Did you see that endorsement put upon the note?

A. My recollection is not.

Int. 101. Q. Did you know at the time of its being put there?

A. I have no recollection at the moment.

Int. 102. Q. You testified the other day, I think, that when you took that note from Mr. Jackson you considered him the owner of it?

A. Yes, sir, I considered Jackson the owner of it.

Int. 103. Q. You testified, I think, that you had seen this note several times after it was taken, before the fire?

A. I think not. My impression is I did not testify that.

Int. 104. Q. When did you first see this last endorsement to which I have called your attention?

A. I don't recollect particularly, that is, I cannot give you the dates at the present moment, but my impression is I have seen it from time to time for two or three years after the fire when the interest was paid.

Mr. BURGESS:

Int. 105. Q. The endorsement on the note itself?

A. The note with the endorsement.

Mr. SKINNER:

Int. 106. Q. This Williams note, by its tenor, did not mature until October 1, 1872?

A. I believe so.

111 Int. 107. Q. After you took this note from Mr. Jackson for Mr. Smith, were you ever asked to make or to cause to be made any endorsement upon this note of payments of interest?

A. No, sir.

Int. 108. Q. By anybody?

A. No, sir; not to my recollection.

Int. 109. Q. You never have given anybody any receipts for interest paid on this Williams note?

A. I think not.

Int. 110. Q. When you took this note from Jackson this endorsement of interest, bearing date October 1, 1870, of twelve hundred dollars, was on the note, was not it?

A. I can't swear positively, but my impression is it was.

Int. 111. Q. How was that signed—that endorsement?

A. "S. M. Waite, by O. Jackson."

Int. 112. Q. Do you know when this Williams note was assigned, if at all, from Charles C. Waite to Silas M. Waite?

A. I do not.

Int. 113. Q. Do you know when the same note was assigned, if at all, Silas M. Waite to Obadiah Jackson?

A. I do not. I have no recollection at the moment.

Int. 114. Q. Since taking this note from Mr. Jackson, have you at any time made or caused to be made investigations to see whether interest was being paid upon this note, according to the tenor of it?

A. I have had no occasion to make such inquiries, but I have heard from time to time, when the interest was paid, that it was paid.

Int. 115. Q. On which note?

A. On the $31,500 note.

Int. 116. Q. That is not the note that I have been talking about.

A. I thought it was.

Int. 117. Q. (Question repeated.)

112 A. No.

Int. 118. Q. When did the Jackson note of $31,500 fall due?

A. According to the note, it fell due on April 18, 1873.

Int. 119. Q. Was it extended then?

A. By an endorsement on the back of it, I see that it was.

Int. 120. Q. Read the endorsement.

A. "This note extended for one year from the 18th of April, 1874."

Int. 121. Q. What is it signed?

A. "D. Smith, by J. Watson."

Int. 122. Q. That is your brother?

A. Yes, sir.

Int. 123. Q. Were you consulted as to making that extension by anybody?

A. I don't recollect whether I was or not.

Int. 123. Is there any other endorsement of extension on the Jackson note?

A. Not that I perceive.

Int. 124. Q. So far as the note is concerned, then—so far as anything that appears on the Jackson note is concerned—that never was extended after April 18, 1874?

A. No.

Int. 125. Q. Have you, acting for Mr. Smith, ever extended that note with Mr. Jackson for a longer time than April, 1874?

A. No, sir.

GEORGE WATSON.

Mr. BURGESS. We close here, with the reservation of putting in any documentary evidence that we wish.

Adjourned to one p. m., Thursday, April 12th, 1877.

EXHIBIT 1.

$31,500.] CHICAGO, ILLS., *Apr.* 18, 1871.

Two years after date I promise to pay to David Smith or order,
113 at , thirty-one thousand five hundred dollars, for value received, with interest at the rate of eight per cent. per annum, payable semi-annually, having deposited with him, as collateral security, a note of George N. Williams, of thirty thousand dollars, secured by trust deed to Obadiah Jackson, as trustee, which I hereby give the said

David Smith authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter, or before, in the event of the said securities depreciating in value, at public or private sale, at his discretion, without advertising the same or giving any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of said collateral, and in case the proceeds of the sale of the said collateral shall not cover the principal, interest, and expenses, I promise to pay the deficiency forthwith after such sale.

(Signed) OBADIAH JACKSON.

(On the margin :) Interest on this note to be paid at the rate of nine per cent. per annum from 18th April, 1876; to be paid semi-annually.—J. W.

Know all men by these presents that I, the subscriber, am justly indebted to David Smith, upon a certain promissory note, bearing even date herewith, for the sum of thirty-one thousand five hundred dollars, with interest after due at per cent. per annum, and due two years after date.

Now, therefore, in consideration of the premises, I do hereby make, constitute, and appoint J. N. Jewett, or any attorney of any court of record, to be my true and lawful attorney, irrevocably, for me and in my name, place, and stead to appear in any court of record, in term time or in vacation, in any of the States or Territories of the United States, at any time after said note becomes due, to waive the service of process and confess a judgment in favor of the said David Smith or
114 assigns or assignees, upon the said note, for the above sum or for as much as appears to be due according to the tenor and effect of said note, and interest thereon to the day of the entry of said judgment, together with costs and attorneys' fees; and also to file a cognovit for the amount that may be so due, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up of said judgment or issuing the execution thereon, and also to waive all benefit or advantage to which I may be entitled by virtue of any homestead or other exemption law now or hereafter in force in this State or Territory where judgment may be entered by virtue hereof, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

Witness my hand and seal this 18th day of April, A. D. 1871.

OBADIAH JACKSON.

In presence of—
GEORGE WATSON.

Endorsements.

(1.) This note extended for one year from 18th April, 1874. 10%, semi-annually.

D. SMITH,
P'r J. WATSON.

(2.) Nov. 4, 1871.—Received of Mr. Obadiah Jackson twelve hundred and sixty dollars, 6 mos.' int., due Oct. 18th.

115 (3.) APRIL 18th, 1872.—Rec'd six mos.' interest, $1,260, on within note.

D. SMITH.

(4.) Rec'd six months' int. on the within note, till Oct. 18, 1872.

D. S.

(5.) Rec'd six months' int. on the within note, till Ap'l 18, 1873.

D. S.

(6.) 1873. OCT. 18TH.—Interest paid on the within note to date.

D. SMITH,
P'r J. WATSON.

(7.) 1874. AP'L 22.—Int. paid on the within note to 18th Ap'l, 1874.

D. SMITH,
P'r J. WATSON.

(8.) 1874. OCT. 17.—Interest paid on the within note to 18th Oct., '74.

D. SMITH,
Per J. WATSON.

(9.) 1875. APR. 19.—Int. paid on this note to 18th Ap'l, 1875.

J. WATSON.

(10.) 1875. OCT. 23.—Int. paid on the within note to 18th inst.

(11.) 1876. APR. 19.—Int. paid on the within note to 18th Ap'l, 1876.

J. W.

(12.) 1876. OCT. 26.—Rec'd $1,000 on a/c of interest.

J. W.

EXHIBIT 2.

$30,000.] CHICAGO, *Oct. 1st*, 1868.

Four years after date I, the subscriber, of Chicago, county of Cook, State of Illinois, promise to pay to Charles C. Waite or order thirty thousand dollars, for value received, with interest at eight per cent. per annum, payable semi-annually, at the bank of A. C. & O. F. Badger, in Chicago.

GEORGE N. WILLIAMS.

(On the margin:) This note secured by trust deed of even date herewith, duly stamped.

116 Know all men by these presents that I, the subscriber, am justly indebted to Charles C. Waite upon a certain promissory note bearing even date herewith for the sum of thirty thousand dollars with interest at eight per cent. per annum payable semi-annually and due four years after date.

Now, therefore, in consideration of the premises, I do hereby make, constitute, and appoint Obadiah Jackson or any attorney of any court of record to be my true and lawful attorney irrevocably for me and in my name, place, and stead, to appear in any court of record, in term

time or in vacation, in any of the States or Territories of the United States, at any time after said note becomes due, to waive the service of process and confess a judgment in favor of the said Charles C. Waite or his assigns or assignees upon the said note for the above sum or for as much as appears to be due according to the tenor and effect of said note and interest thereon to the day of the entry of said judgment, together with costs and one hundred dollars attorney's fees, and also to file a cognovit for the amount that may be so due, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of said judgement and to release all errors that may intervene in the entering up said judgment, or issuing the execution thereon, and also to waive all benefit of or advantage to which I may be entitled by virtue of any homestead, stay or other exemption law, now or hereafter in force, in this or any State or
117 Territory where judgment may be entered by virtue hereof, hereby ratifying and confirming all that my said attorney may do by virtue thereof.

Witness my hand and seal this first day of October, A. D. 186⁹.

GEORGE N. WILLIAMS. [SEAL.]

In presence of—
OBADIAH JACKSON.

Endorsement.

(1.) APRIL 27, 1869.—Twelve hundred dollars paid on this note, being interest to April 1st, 1869.

S. M. WAITE,
By O. JACKSON.

(2.) OCTOBER 1ST, 1869.—Twelve hundred dollars paid on this note, being interest to Oct. 1st, 1869.

S. M. WAITE,
By O. JACKSON.

(3.) Pay Silas M. Waite or order.

CHARLES C. WAITE.

(4.) Pay to Obadiah Jackson or order.

S. M. WAITE.

(5.) APRIL 1ST, 1870.—Twelve hundred dollars paid on this note, being interest to Apr. 1st, 1870.
$1,200.

S. M. WAITE,
By O. JACKSON.

(6.) OCT. 1ST, 1870.—Twelve hundred dollars paid on this note, being interest to Oct. 1st, 1870.
$1,200.

S. M. WAITE,
By O. JACKSON.

(7.) MAY 17, 1871.—Interest paid on the within note to this date.

S. M. WAITE,
By O. JACKSON.

(8.) Obadiah Jackson.

118 *Copy of exhibit 3.*

This indenture made this first day of October in the year of our Lord one thousand eight hundred and sixty-eight, between George N. Williams, a bachelor of Chicago, Illinois, of the first part and Obadiah Jackson as trustee of the same place of the second part witnesseth:

That whereas the said party of the first part is justly indebted to Charles C. Waite, of the city and State of New York, in the sum of thirty-six thousand dollars according to the tenor and effect of two certain promissory notes of even date, both of said notes payable to the said Charles C. Waite or order and signed by the said George N. Williams, one of said notes being for the sum of six thousand dollars payable one year after date, and one of said notes being for thirty thousand dollars payable four years after date, both of said notes payable at the bank of A. C. & O. F. Badger, in the city of Chicago, Illinois, with interest at the rate of eight per centum per annum, payable semi-annually on the first days of April and October in each year until the maturity of said promissory notes, the said sum of thirty-six thousand dollars being for a portion of the purchase-money of the premises hereinafter described.

Now therefore this indenture witnesseth that the said party of the first part, in order to secure the prompt and punctual payment of the sums of money mentioned in the said promissory notes and the various installments of interest thereon as the same shall respectively mature according to the tenor and effect of the said promissory notes in
119 consideration of the sum of one dollar and the further sum of thirty-six thousand dollars in hand paid to said party of the first part by the said party of the second part, the receipt whereof is hereby acknowledged, has and by these presents doth grant, bargain, sell, and convey unto the said party of the second part as trustee, and to his heirs and assigns, or successors in trust forever all the following described lots, pieces or parcels of land situated in the city of Chicago, County of Cook, State of Illinois, and known and described as follows, to wit: Lots numbered fifteen (15) and sixteen (16) in block one hundred and eleven (111) in the school section addition to Chicago.

To have and to hold the said premises above described, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining unto the said party of the second part, his heirs and assigns or successors in trust forever.

In trust nevertheless, that in case default shall be made in the payment of the said sums of money mentioned in the said promissory notes or of any of the installments of interest on the same, when the same shall respectively mature and become due and payable according to the tenor and effect of said promissory notes by the said party of the first part or his legal representatives, that then and in that case upon application being made to the said party of the second part or his successor in trust by the legal holder of the promissory note aforesaid upon which such default has been made in the payment of either the principal
120 or interest mentioned therein, it shall and will be lawful for the said party of the second part to enter into and upon all and singular the premises hereby granted or intended to be, and with or without such entry as the said party of the second part may elect after publishing a notice in a newspaper published in the city of Chicago, Cook County, Illinois, at least sixty days before the date of such sale, containing a description of the property to be sold and the time and place of sale, for him the said party of the second part to sell at public auc-

tion to the highest bidder for cash at the north door of the court-house, in the city of Chicago, Cook County, Illinois, the aforesaid premises and all of the right and equity of redemption of the said party of the first part, his heirs and assigns therein at the time mentioned in such notice and to adjourn such sale from time to time as the said party of the second part may elect, and to make, execute, and deliver to the purchaser or purchasers of said premises at such sale, good and sufficient deeds of conveyance for the premises so sold and out of the proceeds arising from such sale to pay, first, all costs and charges incurred in making such sale, including all traveling expenses, stamp fees and other disbursements; second, to pay to the legal holder of said promissory note or such of them as shall at the time of said sale be due and owing and unpaid, the amount of principal and interest which shall at that time remain owing on the same, and for that purpose it is expressly agreed by said party of the first part, that in case of default in the payment of any
121 part of said debt and a sale is made as herein before provided that the whole sum of money secured by and mentioned in said promissory notes shall immediately at the option of the legal holder of said notes become due and payable, anything in said notes contained to the contrary notwithstanding; third, in case there shall be any overplus remaining after paying the whole of said debt then to pay the same to said party of the first part or his legal representatives.

And upon further trust upon the payment of the principal and interest mentioned in said promissory notes as the times when they shall respectively mature, then to reconvey said premises to said party of the first part at his cost.

And the said party of the first part doth, for himself, his heirs, executors, and administrators, covenant and agree to and with the said party of the second part that, until the maturity and payment of the aforesaid promissory notes, he will at all times keep the buildings situated on said premises insured against loss or damage by fire to the amount of at least thirty thousand dollars, with good and responsible fire insurance companies, such as shall be satisfactory to the said party of the second part; and that he will assign such policies from time to time to the said party of the second part, to be held by him as collateral security for the payment of the aforesaid sums of money secured to be paid by this trust deed, such insurance money, if there shall by any loss by fire, to be used by the said party of the second part, under the direction
122 of the said party of the first part, in repairing or re-erecting such portion of said building as may be destroyed or injured by fire; and the same amount of insurance shall be kept at all times so assigned until the payment of all of said debt upon any future building that may be erected upon said premises.

And the said party of the first part doth further covenant as aforesaid that he will at all times during the continuance of the aforesaid debt keep and maintain the said premises and the buildings thereon in good repair and condition, in accordance with the laws and ordinances of the city of Chicago and of the Board of Public Works and health officers; also, that he will pay promptly all taxes and assessments levied upon or assessed on the same until the payment of said debt.

And the said party of the first part hereby expressly waives and releases any and all right, benefit, privilege, advantage, and exemption under and by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act of the general assembly approved February 11th, A. D. 1851, entitled "An act to exempt homesteads from

sale on execution," and an act approved Feb'y 17th, A. D. 1857, entitled "An act to amend an act to exempt homesteads from sale on execution."

And the said party of the first part, for himself, his heirs, executors, and administrators, covenants with the said party of the second part that he is well seized of said premises in fee simple; that he has
123 good right, full power, and lawful authority to grant, bargain, and sell the same in form aforesaid; that the same are free and clear from all incumbrances, and that he will, and his heirs, executors, and administrators shall forever warrant and defend the same against the lawful claims of all persons.

In witness whereof the said party of the first part has hereunto set his hand and seal this day and year first herein written.

GEORGE N. WILLIAMS. [SEAL.]

Signed, sealed, and delivered in presence of—
D. M. SCOTT.
S. J. ANDREWS.
[Stamps, $36.]

STATE OF ILLINOIS,
Cook County, city of Chicago, ss:

I, Francis A. Hoffman, jr., a notary public in and for said city, county, in the State aforesaid, do hereby certify that George N. Williams (a bachelor), who is personally known by me to be the same person whose name is subscribed to the annexed trust deed, appeared before me this day in person, and acknowledged that he had signed, sealed, and delivered the said instrument of writing as his free act and deed, for the uses and purposes therein expressed.

Given under my hand and notarial seal this twelfth day of October, A. D. 1868.

[SEAL.] FRANCIS A. HOFFMAN, JR.,
Notary Public.

124 (Endorsement:) George N. Williams to Obadiah Jackson, use of Charles C. Waite. Trust deed. No. 187274. Recorded Oct. 24, 1868. Book 487 deeds, p'g' 172. Wm. L. Church, cl'k.

125 SMITH
vs.
PERKINS.

APRIL 12TH, 1877.

The parties met pursuant to adjournment, and FRANCIS A. HOFFMAN, Jr., a witness produced, sworn, and examined on behalf of the defendant, testified as follows:

Direct examination by Mr. SKINNER:

1. Q. How long have you lived in Chicago?
A. Chicago has been my residence for twenty-four years, off and on.
2. Q. You are in the practice of the law?
A. Yes, sir.
3. Q. How long have you been doing that in Chicago?
A. Ten years.
4. Q. In the year 1868 did you know any man by the name of George N. Williams?

A. Not that I remember now.

5. Q. Did you ever know a man by that name?

A. I could not tell that unless he should be connected with some other matter.

6. Q. Have you any recollection of any such a party now?

A. No, sir; I have not.

7. Q. Do you know Obadiah Jackson?

A. Yes, sir.

8. Q. How long have you known him?

A. I have known Mr. Jackson for eleven years.

9. Q Have you done business with him in that time?

126 A. Yes, sir. I studied law in the law office with which he was connected, of McAllister, Jewett & Jackson, and was in the office eleven years ago six months steady, and ten years ago I was in the office about half a year.

10. Q. Were you studying in the office of the firm of which Mr. Jackson was a member in 1868?

A. I am not certain, but I think I was there in the spring of 1868. Some portion of that year, at any rate, early portion of it, I was in that office.

Counsel shows witness Exhibit 3 in the case, to which paper writing is endorsed "George N. Williams to Obadiah Jackson, use of Charles C. Waite, trust deed," and refers the witness to the name of Francis A. Hoffman, jr., notary public, which appears upon a purported certificate of acknowledgment to said paper writing, and asks:

Is that your signature—the name of Francis A. Hoffman, jr.?

(Question objected to by complainant's solicitor.)

I think it is; yes, sir. It looks a little too stiff for my handwriting; that is all.

11. Q. Still, you think it is your signature?

A. I do.

12. Q. Do you remember signing that certificate?

(Objected to.)

A. No, sir; I do not.

13. Q. Have you any recollection of ever seeing George N. Williams, whose name appears there in this certificate?

(Objected to.)

A. Now that you ask me about Williams, if that Williams is the

127 gentleman who married the widow of Stephen A. Douglass, I have seen a man whom I was told by Mr. Jackson was Mr. Williams—General Williams I believe they called him, if that is that person; otherwise I have no recollection of any such name.

14. Q. You recollect no person by the name of Williams except the one who married the widow Doug'ass?

(Objected to.)

A. No.

15. Q. You know no person indicated by the name of George N. Williams, unless it might be Gen. Williams who married Stephen A. Douglass' widow, do you?

(Objected to.)

A. I cannot remember it now; no, sir.

16. Q. Do you know of any man by the name of George N. Williams?

(Objected to on the ground that it is not material whether he knows him now or not, and therefore the counsel objected to all this line of examination.)

A. I do not, that I know of now.

17. Q. Did you ever know such a man?
A. That I cannot tell.
18. Q. Have you any recollection of ever knowing such a man?
(Objected to.)
A. I have known a number of men by the name of Williams, whether just by those initials I couldn't tell.

Cross examination by Mr. BURGESS:

128 1. Q. Is that seal that is attached to that certificate the one that you were in the habit of using at that time?
A. Yes, sir; that was my seal at that time.
2. Q. Did any person come before you purporting to be that man at that time?
A. Yes, sir.
3. Q. Did you ever take any acknowledgment without any person appearing?
A. No; there cannot be a more particular person than I am in that respect.
4. Q. From the manner in which you did business could you state whether you ever took an acknowledgement without the persons appearing before you?
A. I never did, sir, in my life.
15. Q. What was your practice in regard to knowing the persons on being made acquainted with the person whose acknowledgement you took?
A. I never took the acknowledgement of any person that I either did not know personally myself or was not introduced to me by some party whom I knew to be a respectable party and worthy of belief.

Redirect examination by Mr. SKINNER:

19. Q. Do you now recollect what parties came before you when you signed the certificate attached to this deed that has been shown you?
A. I am satisfied with this much, that the party was introduced to me by Mr. Jackson. The way I would know that is from the examination of the paper itself, that it was somebody who was introduced to me by him; it was a thing that he did upon several occasions that I
129 know of and that was not unusual for him to do.
20. Q. Your belief is that the party who appeared before you when you signed the certificate attached to the trust deed which has been shown you was introduced to you by Mr. Jackson?
A. I am almost positive of it.
21. Q. And that is the only personal acquaintance you had with the party?
A. Yes, sir; the only acquaintance I had with him.

FRANCIS A. HOFFMAN, JR.

JOHN WATSON, being called as a witness on behalf of the defendant, was duly sworn, and testified as follows:

Direct examination by Mr. SKINNER:

1. Q. You knew David Smith in his lifetime?
A. Yes, sir.
2. Q. You were a relative of his, I believe?
A. Brother-in-law.
Counsel shows witness a note for $31,500, bearing date April 18th, 1871, signed Obadiah Jackson, witnessed by George Watson, and asks:
Have you ever had that note in your possession for Mr. Smith?

A. I have.

3. Q. When was it first placed in your custody?

A. When it was made.

4. Q. By Mr. Smith?

A. Yes, sir.

130 Again showing the witness the note, and calling his attention to the endorsements upon the back of it, counsel asks:

Are those endorsements in your handwriting?

A. Not the whole of them, sir.

5. Q. Which ones are in your handwriting? Those beginning with the date of October 18th, 1873, and from that on?

A. Yes, sir.

6. Q. In whose handwriting, if you know, are the endorsements prior to that date?

A. Mr. Smith's, I would say.

7. Q. (Referring again to the endorsements beginning October 18th, 1873, and continuing down to and including the one of October 26th, 1876.) Did you receive the monies stated in each and every one of these endorsements at the time you put them upon the note?

A. Yes, sir.

8. Q. Those monies were paid you for interest that had accrued on this note?

A. Yes, sir.

9. Q. Who made those payments of interest to you?

A. Obadiah Jackson.

10. Q. Look, please, upon the first endorsement of the note, reading this note extended for one year from the 18th of April, 1874, signed "G. Smith by J. W." In whose handwriting is that endorsement?

A. Mine, sir.

12. Q. Was that note extended at that time as indicated by the endorsement?

A. It might have been at the time, and perhaps prior to the time.

12. Q. At or about that time?

A. Yes, sir.

131 13. Q. Was the extension made by you?

A. It was by me.

14. Q. By authority of Mr. Smith?

A. Yes, sir.

Mr. HIGGINS:

15. Q. Was he living in 1874?

A. Yes; he died in 1875.

Mr. SKINNER:

16. Q. Do you know whether any other extensions had been made on this note other than the one indicated by this endorsement?

A. Yes, sir; I do.

17. Q. When?

A. After the maturity of the note it was extended.

18. Q. On and after April 18th, 1874, have you for Mr. Smith made any extensions?

A. I have after that time when it was in my possession.

19. Q. At what time did you make an extension after this one that is indicated?

A. Every extension since.

20. Q. How many extensions?

A. Until 1874, '75, and '76.

21. Q. What extensions have you made after this one that is indicated by the endorsement that has been read here?

A. I made an extension from 1875 to 1876, and then I made an extension from 1876 to 1877, at a lower rate of interest than it was then drawing. Prior to that it was drawing ten per cent. I arranged with Mr. Jackson for nine.

Counsel shows witness the supposed note for $30,000 dated Chi-
132 cago, October 1st, 1868, with the name of George N. Williams at the foot of it, a copy of which has been put in evidence by the complainant, and asks:

Did you ever have that note in your possession for Mr. Smith?

A. Yes, sir.

22. Q. When did it first come to your possession?

A. Same as that, April 18, 1871.

23. Q. And you have had this note in your possession at all times when you have had the Jackson note in your possession?

A. Yes, sir.

24. Q. When did you part with the possession of this Williams note?

A. The same time that I did with that.

25. Q. When was that?

A. It got out of my possession on the 9th of October, 1871.

26. Q. Didn't you have possession of it after that?

A. I did.

27. Q. Have you had possession of it since October, 1871?

A. No, sir.

28. Q. But you say you have had possession of this Williams note at all times when you have had the Jackson note?

A. Yes, sir.

29. Q. Tell me during just what periods you have had the Jackson note.

A. I had the Jackson note from the time it was made until the fire; I then had access to it after the fire, at Evanston, perhaps six weeks; Mr. Smith then took it away and put it with his other securities in the Fidelity safe; I then had access to it to the 1st of May following, 1872;

Mr. Smith then left for Europe and I had the key of that vault
133 and had access to it.

30. Q. Beginning with the first of May, 1872?

A. Yes, sir.

Q. Have you had access to it ever since?

A. Ever since.

32. Q. You have controlled it ever since, haven't you?

A. Well, I suppose you may call it so.

33. Q. You have made all the collections of interest on the Jackson note that have been made, haven't you?

A. No, sir, not all of them; Mr. Smith made some.

34. Q. You have made all the collections of interest that have been made on the Jackson note, beginning with and after October 18th, 1873?

A. Yes, sir.

35. Q. Is that the first collection of interest that you made, on October 18th, 1873?

A. I think it is.

36. Q. During the time that you had possession of and access to the George N. Williams note was there any interest paid you on the Williams note?

A. No, sir.

37. Q. Ever any offered?

A. No, sir.

38. Q. Ever any conversation between you and Mr. Jackson about interest on it?

A. Not to my recollection.

39. Q. Did you ever make any attempt to collect interest on the Williams note?

A. No, sir; from the fact that the interest on the other was always paid promptly.

40. Q. Were you ever instructed by Mr. Smith to make any collections of interest on the Williams note?

A. No; I have no recollection of it that I was.

134 41. Q. I will show you the Williams note again. Look at the endorsements and please tell me whether those endorsements and all of them were on there when the note first came into your possession?

A. Yes, sir; there has no person had an opportunity of endorsing them on since.

42. Q. When did that Williams note first come to your possession?

A. The same time as the note it accompanied as collateral security.

43. Q. When?

A. The 18th of April, 1871.

Cross examination by Mr. HIGGINS:

Q. When Mr. Smith went to Europe, which you say was in May, 1872, these papers were in the Fidelity safe vault?

A. They were.

2. Q. You had a key to that vault?

A. He left me a duplicate key; yes, sir.

3. Q. And did any one else have a key besides yourself until his return from Europe?

A. No one to my knowledge.

4. Q. What time did he return from Europe?

A. I don't know when he returned from Europe, but I have a recollection when he came back to Chicago.

5. Q. What time did he come back to Chicago from Europe.

A. I think it was in the month of September following.

6. Q. These two notes then were in the Fidelity safe vault from May until September, 1872?

A. They were.

135 7. Q. You have had them substantially under your joint charge up to the time of his death, and under your exclusive charge since his death, haven't you?

A. Yes, sir.

8. Q. Now, you speak of extending the time of payment on this note for 1877. What conditions were there about the payment of interest in that case, how was the interest payable?

A. It was to be paid semi-annually, nine per cent. per annum.

9. Q. State whether there was a default made in the payment of the interest in October, 1876.

A. There was.

10. Q. He did not then comply with the terms of the agreement upon which an extension was to be granted, did he?

A. He did not.

11. Q. What was the agreement in regard to extending the time? Was there any condition about his paying any interest? Was it extended upon condition or absolutely?

A. Extended for a year with the interest that he paid semi-annually at nine per cent.

12. Q. And if the interest was paid semi-annually it was to be extended, was it?

A. That was the agreement before. That is to say, when it matured, when the year expired I saw Mr. Jackson sometime previous, perhaps a month or three weeks previous, and we agreed upon having it extended for a year. He wanted it extended at eight per cent., which I would not agree to; finally we agreed upon nine.

12. Q. This agreement was made before the 18th day of April, 1876?

A. Yes, sir.

136 13. Q. This is interest upon the note to be paid at the rate of nine per cent. from the 18th of April, 1876, to be paid semi-annually. Was the agreement which you made put in writing and endorsed on the note at that date?

A. It was not put on at the time when we made the arrangement. The arrangement was not made in my office. It was made, I think, in Mr. Jackson's office on La Salle street, and Mr. Jackson was not present, in fact, very seldom was present even in paying the interest. I generally had the interest paid at his office, and he always, I supposed, trusted to me in making the endorsements.

15. Q. These endorsements you made on his note in his presence, you think?

A. No, sir; it was not in his presence.

16. Q. This agreement, you think, was made two or three weeks before the 18th of April, 1876?

A. Yes; I should think so. I only spoke to Mr. Jackson a little time before the maturity of the note to see what he intended doing for the forthcoming year.

Redirect examination by Mr. SKINNER:

44. Q. Did you make any written extensions of the Jackson note except what appear in writing on the note?

A. No, sir; nothing more than what happens on it.

45. Q. Did you take any part in the negotiation by which the Jackson note and the Williams note were bought by Mr. Smith?

A. No, sir; that was done between Mr. Smith and my brother.

46. Q. Did you ever know a man by the name of George N.

137 Williams?

Never, sir.

JOHN WATSON.

(Complainant's counsel calls upon the defendant's counsel to produce the original deed from Charles V. Dyer and wife, to Obadiah Jackson, dated the 1st day of June, 1872, and in the absence its production by the counsel offers in evidence a certified copy from the recorder's office marked Exhibit No. 4.

The defendant's counsel object to the reception of the copy in evidence on the ground they have not and never have had the original deed in their possession.)

EXHIBIT 4.

[U. S. revenue stamp to the amount of $1 on this deed.]

This indenture, made this first day of June, in the year of our Lord one thousand eight hundred and seventy-two, between Charles V. Dyer

and Louisa M. Dyer, his wife, of Chicago, Illinois, party of the first part, and Obadiah Jackson, of the same place, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party
138 of the second part forever released and discharged therefrom, ha' granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the following described lots, pieces or parcels of land situated in the county of Cook, and State of Illinois, to wit: Lots fifteen (15) and sixteen (16) in block one hundred and eleven (111) in the school section addition to Chicago.

Together with all and singlar the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, dower, right of dower, claim or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances: to have and to hold the premises above granted and described, with the appurtenances, unto the party of the second part, his heirs and assigns, forever.

And the said Charles V. Dyer, party of the first part, for himself, his heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed, as of a good, sure,
139 perfect, absolute and indefeasible estate of inheritance in law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell and convey the same, in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature soever, and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the party of the first part shall and will warrant and forever defend.

Subject, nevertheless, to a trust deed given by George N. Williams, dated October 1st, 1868, recorded in book 487 of deeds, page 172, to secure a certain note on which is due $30,000 and interest, also subject to a trust deed to James B. Runnion, trustee, dated May 17th, 1871, duly recorded in the recorder's office of Cook County, Illinois, the payment of both of which encumbrances is hereby assumed by the party of the second part, also subject to all taxes and assessments hereafter to be made on said premises which are to be paid by the party of the second part; and the party of the first part, for the consideration above mentioned, do hereby expressly waive and release all right and benefit which he ha in and to said premises or to which he may be entitled under and by virtue of an act entitled "An act to exempt homesteads from sale on execution," approved February 11th, 1851, and also an act entitled "An act to amend an act to exempt homesteads from sale on execution," approved February 17th, 1857, as well as any and all
140 other acts of a like character or for a similar purpose.

In witness whereof the said party of the first part hereunto *at* their hands and seals the day and year first above written.

CHARLES V. DYER. [SEAL.]
LOUISA M. DYER. [SEAL.)

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

I, William C. Cole, a notary public in and for said city in said county in the State aforesaid, do hereby certify that Charles V. Dyer and Louisa M. Dyer, his wife, who are personally known to me as the same persons whose names are subscribed to the annexed instrument of writing, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instruments of writing, as their free and voluntary act, for the uses and purposes therein set forth.

And the said Louisa M. Dyer, wife of the said Charles V. Dyer, having been by me examined separate and apart and out of hearing of her said husband and the contents and meaning of the said instrument of writing having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower and all her right, title, and interest in and to the lands and tenements therein mentioned; and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all homestead exemption laws, so called, without compulsion of her said husband, and that she does not wish to retract the same.

141 Given under my hand and notarial seal this fourteenth day of June, A. D. 1872.

[NOTARIAL SEAL.] WILLIAM C. COLE,
Notary Public.

No. 37963. Filed for record June 18th, 1872.
NORMAN T. GASSETTE,
Recorder.

STATE OF ILLINOIS,
County of Cook, ss:

I, James W. Brockway, recorder of deeds in and for said county in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the 18th day of June, A. D. 1872, as document No. 37963 and recorded in book 105 of records, at page 197.

In testimony whereof I have hereunto set my hand and affixed my official seal at Chicago this twelfth (12) day of April, A. D. 1877.

[SEAL.] JAS. W. BROCKWAY,
Recorder.

THOMAS PARKER a witness produced, sworn and examined on behalf of the complainant, testified as follows:

Direct examination by Mr. BURGESS:

142 1. Q. What is your age and residence?
A. My age is about 36; residence, 430 Jackson street.
2. Q. Did you know Charles C. Waite?
A. Yes, sir.
3. Q. And Silas M. Waite?
A. Yes, sir.
4. Q. Are you acquainted with their handwriting?
A. Yes, sir.

5. Q. How long have you known them?

A. I have known M. C. C. Waite since 1858; I met Mr. S. M. Waite, I guess, two or three years after that, and have met him more or less until 1867 or 1868, at the time Mr. Waite left here; I have not seen S. M. Waite since; I may have seen him once since—met him in New York.

6. Q. What business were they in, either of them, in Chicago?

A. Mr. C. C. Waite was proprietor of the Sherman House in Chicago. Mr. S. M. Waite, I don't know as he had any business. He at that time was cashier of a bank in Brattleboro.

7. Q. Did you become acquainted with the signatures of these parties?

A. Yes, sir.

8. Q. Would you know their signatures if you were to see them?

A. Yes, sir.

10. Q. Look at the paper now shown to you, being a note dated Chicago, August 1st, 1868, for thirty thousand dollars, signed by George N. Williams, and state as to your opinion as to the signatures of the endorsers thereon, S. M. Waite and C. C. Waite.

A. That is Mr. Charles C. Waite's handwriting, "Pay Silas M.
143 Waite, or order; Charles C. Waite;" and "Pay to Obadiah Jackson." I should say that was Obadiah Jackson's writing. "S. M. Waite," that is his signature below it.

Mr. HIGGINS. You are well acquainted with his handwriting and familiar with his signature?

A. Yes, sir; I have been in correspondence with Charles C. Waite and am now. S. M. Waite, I have not seen his signature since 1868 or '9.

12. Q. You were familiar with it then and knew it well?

A. Yes, sir.

Cross examination by Mr. SKINNER:

1. Q. You first saw Charles C. Waite in 1858?

A. Yes, sir.

2. Q. Where did you become acquainted with him?

A. He was secretary of the City Fire Insurance Company; I went in their employ in 1858; I came out here with him. He came out here in July or August, 1862, and I came out in October.

3. Q. During what period since 1858 has your employment been in the same business as Mr. Waite?

A. I was in the employ of the City Fire Insurance Company, of which he was secretary, and then when I came out here with him I was bookkeeper of Gage and Waite at the Sherman House.

4. Q. How do you know his handwriting?

A. I have known it by seeing it, seeing him sign his name a great many times in the City Fire Insurance Company and on the checks of Gage and Waite, and have had private correspondence with him.

5. Q. How do you know S. M Waite's handwriting?

144 A. By letters to me on account of business for Charles C. Waite, and also on bank bills which I received at the time that Mr. Charles C. Waite first came out here. He had some money put in the Western Marine Bank for circulation, and we used to draw it out and pay our help with it.

6. Q. Do you know where S. M. Waite is now?

A. I don't know, unless at Brattleboro', Vermont. That is his residence; he is an officer of the bank there.

7. Q. Charles C. Waite is at the Brevoort House in New York?

A. At the Brevoort, and also at the Windsor; either place.

Redirect examination by Mr. BURGESS:

13. Q. Did you know the property when you were in the employ of Waite on Clark street?

A. I knew he owned a piece of hotel property down there. I used to go down there to collect the rents.

14. Q. Can you tell us whereabouts the property is on Clark street?

A. It was just this side of Polk on the right hand side going down. It was then called the Lloyd House; at that time he had it.

15. Q. Who had it?

A. Mr. Waite owened it and I think a man by the name of Hervey or Harvey or something was the proprietor of it, although I am not positive; I have forgotten his name.

16. Q. Do you know anything about a sale of that property by Mr. Waite?

A. No, sir, I do not; I know he notified me it was sold and wrote me that would be the end of my troubles—going up there after the rents.

145 17. Q. Do you know who negotiated the sale for him?

A. I know he was in correspondence with Mr. Jackson at the time, and he notified me that it was sold. Mr. Jackson was his lawyer at the time; used to do all his business with him—advice and so forth.

18. Q. Did you hear anything of Mr. Williams in connection with it?

A. No, sir.

19. Q. You don't know, then, to whom the property was sold?

A. No, I do not.

20. Q. Where was Waite at that time?

A. In the Brevoort House, at New York.

Mr. SKINNER. Did you ever know a man by the name of George N. Williams?

A. Not to my recollection.

THOMAS G. PARKER.

Adjourned to Monday, April 16th, at 1 o'clock p. m.

APRIL 16TH, 1877—1 o'clock p. m.

Complainant's counsel offers in evidence a warranty deed of the land in controversy from Charles V. Dyer & wife to Obadiah Jackson, dated June 1st, 1872, and the same is marked Exhibit 5.

Adjourned subject to one day's notice by counsel for defendant.

146 EXHIBIT 5, C. V. D.

This indenture, made this first day of June, in the year of our Lord one thousand eight hundred and seventy-two, between Charles V. Dyer and Louisa M. Dyer, his wife, at Chicago, Illinois, party of the first part, and Obadiah Jackson, of the same place, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar in hand paid by the said party of the second part, (the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom,) h'd granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the following described lots, pieces or parcels of land, situated in the county of Cook and State of Illinois, to wit:

Lots fifteen (15) and sixteen (16) in block one hundred and eleven (111) in the school section, addition to Chicago, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, dower, right of dower, claim, or demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances:

To have and to hold the premises above granted and described,
147 with the appurtenances, unto the party of the second part, his heirs and assigns, forever.

And the said Charles V. Dyer, party of the first part, for himself, his heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in law, in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of what kind or nature soever, and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof the party of the first part shall and will warrant and forever defend; subject, nevertheless, to a trust deed given by George N. Williams, dated October 1st, 1868, recorded in book 487 of deeds, page 172, to secure a certain note in which is due $30,000 and interest, also subject to a trust deed to James B. Runnion, trustee, dated May 17th, 1871, duly recorded in the recorder's office of Cook County, Illinois, the payment of both of which incumbrance is hereby assumed by the party of the second part, also subject to all taxes and assessments hereafter to be made on said premises, which are to be paid by the party of the second part.

And the party of the first part, for the consideration above mentioned,
do hereby expressly waive and release all right and benefit which
148 he ha' in and to said premises, or to which he may be entitled, under and by virtue of an act entitled "An act to exempt homesteads from sale on execution," approved February 11th, A. D. 1851, and also an act entitled "An act to amend an act to exempt homesteads from sale on execution," approved February 17th, 1857, as well as any and all other acts of a like character or for a similar purpose.

In witness whereof the said party of the first part hereunto set their hands and seals the day and year first above written.

CHARLES V. DYER. [L. S.]
LOUISA M. DYER. [L. S.]

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

I, William C. Cole, a notary public in and for said city, in said county, in the State aforesaid, do hereby certify that Charles V. Dyer and Louisa M. Dyer, his wife, who are personally known to me as the same persons whose names are subscribed to the annexed instrument of writing, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

And the said Louisa M. Dyer, wife of the said Charles V. Dyer, having been by me examined seperate and apart and out of hearing of her said

husband, and the contents and meaning of the said instrument of writing having been by me made known and fully explained to her,
149 acknowledged that she had freely and voluntarily executed the same, and relinquished her dower and all her right, title, and interest in and to the lands and tenements therein mentioned, and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all homestead exemption laws, so called, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this fourteenth day of June, A. D. 1872.

[NOTARIAL SEAL.] WILLIAM C. COLE,
Notary Public.

Doc. No. 37963 filed for record in the recorder's office of Cook County, Illinois, on the 18 day of June, A. D. 1873, and duly subscribed in book 105 of record deeds, page 197.

NORMAN GASSETTE.

JANET SMITH, ADMINI'X
vs.
NORMAN C. PERKINS ET AL.

MAY 31ST, 1877.

The parties met pursuant to adjournment.

Counsel for defendant offers in evidence a paper writing endorsed, "Release deed, Obadiah Jackson to C. V. Dyer," which he reads in evidence with the agreement that the original shall be produced if
150 called for prior to the hearing. Said deed reads as follows:

Know all men by these presents that I, Obadiah Jackson, trustee, of Chicago, in the county of Cook, and State of Illinois, in consideration of the sum of one dollar to me in hand paid, receipt whereof is hereby specially acknowledged, and for other good and valuable considerations, have granted, and do hereby grant, remise, convey, release, and quit-claim unto Charles V. Dyer, of the same place, all right, title, interest, claim, and demand which I might have acquired in, through, or by a certain trust deed bearing date the first day of October, A. D. 1868, duly recorded in the office of the recorder of Cook County, State of Illinois, in book No. 487 of deeds, at page 172, to the premises therein described, namely, lots fifteen (15) and sixteen (16) in block one hundred and eleven (111) in school sections addition to Chicago, in Cook County, Illinois, which trust deed was made to secure the payment of the sum of thirty-six thousand dollars ($36,000), evidenced by two certain promissory notes, bearing even date therewith, from George N. Williams to C. C. Waite.

Witness my hand and seal this second day of October, A. D. 1871.

OBADIAH JACKSON, *Trustee.* [SEAL.]

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

Alexander Siller, a notary public in said county, in the State aforesaid, do hereby certify that Obadiah Jackson, who is personally known
151 to me as the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this third day of August, A. D. 1872.

[NOTARIAL SEAL.] ALEXANDER SILLER,
Notary Public.

The endorsement upon said deed is as follows: "Release deed. Obadiah Jackson to C. V. Dyer."

47467.

STATE OF ILLINOIS,
Cook County, ss:

This is to certify that the within written instrument w record in the recorder's office of said county the third day D. 1872, at and duly recorded in book 5 of records, page 59
NORMAN T. GASSE
Recorder.

ADOLF HEILE, being called as a witness on behalf of defendant, was duly sworn and testified as follows:

Direct examination by Mr. SKINNER:

152 Counsel shows above deed to witness, and asks, Have you had that deed in your possession; and, if so, how long?

A. I have had that deed in my possession since the time it was returned from the recorder's office.

Q. When was that?

A. I cannot fix the exact day. It must have been some time after the filing of the deed, some time, perhaps, in July or August, 1872.

Q. Have you held the deed continually ever since?

A. I have.

Q. How did the deed happen to come to your possession?

A. About that time Dr. Dyer turned over his business, and all his old papers to me—papers of all kinds, and this deed has been amongst them or was returned to me from the recorder's office with other papers.

Q. And you received the deed from the recorder's office?

A. Or Dr. Dyer; I do not remember which.

Q. What is your relation to Dr. Dyer in a business way?

A. I have acted as his agent since about that time—since after the fire.

Cross-examination by Mr. BURGESS:

Q. You have no distinct recollection as to who you received that deed from, have you?

A. I have no distinct recollection as to that.

Q. You do not know whether you got it from Doctor Dyer or whether you got it from the recorder's office?

A. No, sir; I do not.

Q. When did you take the management of Doctor Dyer's affairs?

153 A. Some time in the summer of 1872 I commenced. The doctor left for Europe in October, 1872, and I commenced to take charge of his business during two or three or four months before that time, gradually.

Q. Do you know anything about the original transaction out of which this release came to be given?

A. Not except in a general way.

Q. Do you know anything personally about it?

A. No, sir.

Q. You have no personal knowledge of this instrument further than you find it now amongst Doctor Dyer's papers?

A. I know that the paper has been in my possession for years, because I made an endorsement on it as St. James Hotel, to identify it.

Q. You have no personal knowledge of this instrument further than you find it now amongst Doctor Dyer's papers?

A. I have no further knowledge of the circumstances under which it was issued, only that I know it has been in my possession for so long a time.

Q. Do you know whether Dr. Dyer has ever seen this paper or not personally?

A. Oh, I think he has.

Q. You do not know personally that he has seen it?

Ill A. No; I do not know.

Redirect examination by Mr. SKINNER:

154 Q. Have you any doubt that you received that paper either from the recorder or from Dr. Dyer?

A. Oh, no; I must have received it from either of those two sources.

ADOLF HEILE.

JOHN WATSON, being called as a witness on behalf of the defendants, was duly sworn and testified as follows:

Redirect examination by Mr. SKINNER:

Q. Counsel shows witness the supposed note of Obadiah Jackson of $31,500, which has been made an exhibit in this cause; and also the supposed note of George N. Williams of $30,000, a copy of which has been made an exhibit in this cause, and asks: Have you at any time since those notes came to the hands of David Smith made or caused to be made an examination of the title of the property in litigation here?

A. Examination of the title by which those notes were secured?

Q. Yes, sir.

A. No, sir.

Q. Still calling your attention to the supposed Williams note, have you at any time since this note came to the possession of Mr. Smith made any effort to collect that note, either principal or interest?

A. No, sir.

Q. At any such time, did you ever receive any instructions from Mr. Smith to collect that note, either principal or interest?

155 A. Not to my knowledge.

Q. Since this note was received by Mr. Smith, has any one ever applied to you for an extension of the time of the payment of the Williams note?

A. Not to my recollection.

Q. Have you ever made any such extension of the time of payment of this Williams note?

A. Never.

Cross-examination waived.

JOHN WATSON.

GEORGE WATSON, being called as a witness on behalf of the defendants, was duly sworn, and testified as follows:

Direct examination by Mr. SKINNER:

Counsel shows witness the supposed note of Obadiah Jackson, which has been made an exhibit in the cause, and also the supposed note of George N. Williams, a copy of which has been made an exhibit in the cause, and asks: Since these notes came into the possession of Mr. David Smith, have you ever made any effort in any way, either directly or indirectly, to collect this Williams note, either as to principal or interest?

A. Not individually.

Q. Have you in any way other than individually?

A. I have taken no active steps to enforce its payment only since this litigation.

Q. Either by yourself or by any other party?

A. Not to my knowledge.

156 Q. During any such time, has Mr. Smith ever instructed you to take steps to collect this Williams note, either as to principal or interest?

A. No.

Q. Since these notes came to Mr. Smith's possession, and subsequent to the closing of the transaction by which these notes came to his possession, have you ever made or caused to be made an examination of the title to the property here in litigation?

A. I did.

Q. When?

A. Before taking the notes.

Q. That is not an answer to the question; I said subsequent.

A. Subsequent? Well, then I misunderstood you. No, I have not examined.

Q. You have not examined it or caused it to be examined?

A. I think not until this litigation began, and then only as advising in the matter.

Q At any time since this old Williams note came to the hands of David Smith, have you ever been applied to to make an extension of the time of payment of this Williams note?

A. No, as it has been out of my control.

Cross-examination waived.

GEORGE WATSON.

JANET SMITH, ADM'X,
vs.
PERKINS ET AL.

Met on 11th June, 1877, Monday, 1 p. m., according to notice, complainant appearing by her counsel, Mr. Burgess, and defendants, Swifts, by their counsel, Mr. Skinner.

The following stipulation was entered into:

157 It is hereby stipulated and agreed that no exception or objection shall be had or taken by either party to the proceedings had before the master, H. Waller, esq., on the 11th day of June, A. D. 1877, by reason of the fact that a petition to remove the cause to the Federal court had been heretofore filed in the State court, and that no exception or objection for that reason shall be had or taken, by either party, to any depositions in the cause that may have been or may be subscribed

or signed and verified or sworn to before the said master subsequent to the day of filing of said petition.

W. T. BURGESS,
For Comp't.
GOUDY, CHANDLER & SKINNER,
For Def'ts Swifts.

Counsel for the defendants Swifts offer in evidence a bond made by Obadiah Jackson to Edwin Swift in the penal sum of $50,000, dated June 1st, 1872, to which is attached one coupon, bearing the same date, for the sum of $1,125, which bond is marked for identification Defendants' Exhibit 10.

He also offers in evidence a bond made by Obadiah Jackson to Joseph Swift in the penal sum of $50,000, dated June 1st, 1872, to which is attached one coupon, bearing the same date, for the sum of $1,125, which bond is marked for identification Defendants Exhibit 11.

It is agreed that both bonds may remain with said defendants to be produced at the hearing. It is admitted by the complainant that
158 all of the endorsements upon the back of the note in evidence for the sum of thirty thousand dollars, signed "George N. Williams" are in the handwriting of Obadiah Jackson, except the following words, namely: "Pay Silas M. Waite, or order. Charles C. Waite," and the signature "S. M. Waite," over which is written in Jackson's handwriting, "Pay to Obadiah Jackson, or order."

Defendants here rest, reserving to themselves the privilege and the right, to which the complainant accedes, of taking the depositions of Edwin and Joseph Swift, defendants herein.

Met according to adjournment at 2 p. m. on Wednesday, June 13, 1877, at the residence of Charles V. Dyer.

CHARLES V. DYER, a witness produced, sworn and examined on the part of complainants, deposes and says:

1. Int. State your name, age, residence, & occupation.

Ans. My name is Charles V. Dyer; age is 69 years of age; residence, Chicago; formerly physician, now retired.

Q. Were you ever the owner and in possession of lots 15 & 16 in block 111, in school section addition to Chicago? If so, did you convey it to any one, and to whom and when?

(Question objected to by d'f'ts on the ground that it calls for testimony which, if competent at all, only forms a part of the complainant's case-in-chief.)

Ans. In the summer of 1871 I bid off in Dearborn square, at an auction held by Butler, the Donneagh Gana House, being the premises
159 named in the interrogatory, paying as consideration the amount then unpaid and due on a second mortgage of $5,000 or thereabouts. The property was subject to a first mortgage of $30,000. In this purchase I was afterward joined by Obadiah Jackson, who took a half interest in the property without contributing anything to the investment at that time. Finally Obadiah Jackson, about three weeks after the purchase, withdrew, I paying him $1,000 for his claim. Then in February, 1872, or thereafter, Obadiah Jackson bought the whole property of me, I giving him a quitclaim deed, the land still being subject to the mortgage of $30,000, and another mortgage to James B. Runnion for a smaller amount, the size of which I do not recollect. The consideration paid to me by Obadiah Jackson was $10,000, part in land and part

in money. I held possession of the property from the time I purchased till I sold it to Jackson; I then turned over the possession to Jackson.

(The answer, except as it states the ownership possession and sale by the witness, is objected to as being irresponsive.)

Int. 3. Will you look at the paper now shown you, and state whether it was the deed executed by you to Jackson?

Ans. It is the deed I executed to Jackson.

Int. 4. State whether it was executed and delivered about the day it bears date?

Ans. It was, on the very day, in my office.

Int. 5. State whether the agreement contained in the deed that Jackson was to assume the $30,000 and the other encumbrance to Runnion was a part of the consideration for the property and so accepted by Jackson at the time of the delivery of the deed to him.

160 (Same objections as to the 2d interrogatory.)

Ans. It was, and so accepted by him.

Int. 6. Will you annex that deed with your initials, "C. V. D."?

Ans. I will, and now do.

Int. 7. Did you ever pay the $30,000, or any part of it, on the other incumbrance referred to?

(Same objection.)

Ans. I did not.

Int. 8. Did you ever apply for or obtain a release of either of said encumbrances?

(Same objection.)

Ans. I never did.

Int. 9. Will you look at the release now shown you, dated 2d day of Oct. 1871, and purporting to be recorded on the 3rd July, 1872, in book 5 of records, page 597, and state whether this release was ever delivered to you, or whether you ever saw it before?

(Same objection.)

Ans. It never was delivered to me and I never saw it before.

(Counsel for both parties here admit that the above named release is the same testified to by Mr. Adolph Heile, and it is marked for identification Exhibit X.)

Int. 10. When did first hear of the existence of this pretended release?

(Same objection.)

Ans. Some time in the first of January, 1877, I heard it from Mr. Watson and Mr. Smith. It was new to me entirely.

161 Cross-examination by Mr. SKINNER:

Int. 11. Is the incumbrance of $30,000 you have spoken of the one purporting have been made by one George N. Williams?

Answer. It is.

Int. 12. Are you not now very infirm in health?

Answer. Pretty poor.

Int. 13. Have you not recently had a stroke of paralysis?

Answer. Yes.

Int. 14. Are you not now, and have you not for some time been, confined to your room from the effects of the same?

Answer. I am the greater part of the time, but I ride out nearly every day.

Int. 15. Have you a clear recollection of what occurred as far back as the year 1872?

Answer. Perfectly.

Int. 16. Who has the possession of your deeds and other papers connected with your transactions had before your stroke of paralysis?

Answer. Adolph Heile.

Int. 17. How long has he had them?

Ans. Since about July of 1872. I went abroad in 1872.

Int. 19. Did you give these deeds and papers to Mr. Heile?

Ans. I did, when I went abroad; this paper (showing the release) I never gave him.

Int. 20. When you went abroad in 1872, did you put Mr. Heile in charge of your business affairs?

Answer. Everything.

C. V. DYER.

162 It is stipulated that no exception or objection shall be had or taken to the cross-examination of the witness by reason of the fact that it was taken and reduced to writing by Owen Skinner, counsel for the defendants Swifts.

VAN H. HIGGINS,
Of Counsel.

I, Henry Waller, one of the masters in chancery of the circuit court of Cook County, do hereby certify that previous to the examination of the witnesses whose names are subscribed to the foregoing depositions they were each by me duly sworn according to law, that the same were taken upon oral interrogatories propounded by the solicitors of the complainant and the defendants at my office in Chicago, except in the case of Charles V. Dyer, whose deposition was taken before me at his 'esidence in Chicago, and that they were subscribed and sworn to before me by the said witnesses respectively, on the days as stated in the body of said deposition.

Witness my hand this 14th day of June, A. D. 1877.

HENRY WALLER,
Master in Chancery of Circuit Court of Cook Co.

Master's fees for depositions, including charges paid shorthand reporters

Am't paid by complainant	$31 97
" " by def'ts Swifts	16 53
Total p'd	$48 50

H. WALLER,
Master.

163 STATE OF ILLINOIS,
County of Cook, ss:

I, Jacob Gross, clerk of the circuit court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all papers filed and proceedings had and entered of record in a certain cause lately pending in said court, on the chancery side thereof, between Janet Smith, adm'x, &c., complainant, and Norman C. Perkins et al., defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Chicago, in said county, this 28th day of June, 1877.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed:) Filed June 29, 1877. Wm. H. Bradley, clerk.

164 Afterwards, to wit, on the 11th day of July, A. D. 1877, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JANET SMITH, ADMINISTRATRIX, &C., v. NORMAN C. PERKINS ET AL. } In chancery.

On motion, it is ordered by the court that this cause be referred to Henry W. Bishop, esq., the master in chancery of this court, to take proofs herein and report the same to the court.

Afterwards, to wit, on the 13th day of July, A. D. 1877, said defendants, Edwin and Joseph Swift, by their solicitors, filed in said clerk's office their motion to amend their petition for removal in said entitled cause, which said motion is in the words and figures following, to wit:

Motion to amend petition for removal.

UNITED STATES OF AMERICA, *ss:*

In the circuit court of the United States in and for the northern district of Illinois.

JANET SMITH, ADM'X, v. NORMAN C. PERKINS, TRUSTEE, ET AL. }

165 The defendants Edwin and Joseph Swift hereby enter their motion for leave to amend the petition for removal from the State court to this tribunal by averring in said petition that the said complainant was, at the time of the commencement of this suit, ever since has been, and now is an alien and a subject of the kingdom of Great Britain and Ireland, and by striking out of said petition the averment that the said complainant was at the time of the commencement of this suit, ever since has been, and now is a citizen of the State of Illinois.

Dated Chicago, July 13, '77.

GOUDY, CHANDLER AND SKINNER,
Sol'rs for said Defendants.

(Endorsed:) Filed July 13, '77. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 27th day of August, A. D. 1877, in the said July term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JANET SMITH, ADM'X, &C., v. NORMAN C. PERKINS ET AL. } In chancery.

166 On motion of W. T. Burgess, solicitor for complainant, it is ordered that Henry Waller, esq., be and is hereby appointed examiner to take the testimony of witnesses in this cause residing in

said district, and report the same to the court with all convenient speed. And it is further ordered that this order be entered and stand and take effect nunc pro tunc as of the twenty-fourth day of August instant.

Afterwards, to wit, on the 2nd day of October, A. D. 1877, said complainant, by her solicitor, filed in said clerk's office her replication in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

In the circuit court of the United States for the northern district of Illinois.

JANET SMITH
vs.
NORMAN C. PERKINS ET AL. } In chancery.

The replication of the said complainant to the answers of the said defendants to the bill of complaint in this cause.

This repliant, saving all just exception to said answers, for replication hereto, says that she will aver, maintain, and prove the said answers to be untrue, uncertain, and insufficient, and her said bill to be
167 true, certain, and sufficient; and she prays as in and by her said bill she hath already prayed, &c.

W. T. BURGESS,
Compl't's Sol'r.

(Endorsed:) Filed Oct. 2, 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 6th day of October, A. D. 1877, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JANET SMITH, ADMINISTRATRIX OF DAVID Smith, deceased,
vs.
NORMAN C. PERKINS, GEORGE N. WILLIAMS, Obadiah Jackson, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company of Newark, New Jersey, Eli F. Hollister, S. H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orris, J. L. Orris, Isaac Meyer, Mayer Palintski, Aaron Barnett, John J. Morgan, Bernard Ginsburg. } In chancery.

168

And now at this day comes the complainant, by her counsel, Van H. Higgins, and the defendants, by their counsel, W. C. Goudy and O. Skinner, and this cause came on for hearing upon bill, answers, replications, and proofs, and was argued by counsel.

It is, therefore, upon consideration of the premises, ordered, adjudged, and decreed that there is due the complainant upon the note made by Obadiah Jackson, set out in the pleadings and in evidence in this cause, the sum of thirty-four thousand six hundred and fifty-eight dollars ($34,658.00). That the complainant is entitled to the lien created by the note made by George N. Williams, dated October first, A. D. 1868, and the trust deed of the same date accompanying the same and recorded the twenty-fourth day of October, A. D. 1868, which are set out in the pleadings and in evidence in the cause, upon the lands and premises therein and hereinafter described, to secure the payment of the said sum of money, and entitled to enforce the same so far as may be necessary for that purpose, which lien is hereby established upon said prem-
169 ises and declared to be prior to that of any of the other parties to this suit.

It is, therefore, further ordered, adjudged, and decreed that unless the said defendants, or some of them, shall, within one hundred days from the date of this decree, pay or cause to be paid to the said complainant, or to her solicitor for her, the said sum of thirty-four thousand six hundred and fifty-eight dollars ($34,658.00) and the costs of this suit by her expended taxed,

That then the said premises in the said trust deed and the bill of complaint described as follows, viz, lots numbers fifteen (15) and sixteen (16), in block number one hundred and eleven (111), in the school section addition to Chicago, in the county of Cook, and State of Illinois, with the appurtenances, be sold at public auction by or under the direction of Henry W. Bishop, esquire, one of the masters in chancery of this court, in the city of Chicago, where said premises are situated; that the said master give public notice of the time and place of such sale according to the course and practice of this court, and that the complainant, or any of the parties in this cause, may become the purchaser of the premises at such sale.

170 And that for the purposes of making such sale under said trust deed in pursuance of the powers therein contained, said Henry W. Bishop is hereby substituted in the place of said Obadiah Jackson as trustee thereunder to carry into effect and execution the trusts thereby created.

And that the said master, out of the proceeds of such sale, pay his own fees, commissions, and disbursements, and to the plaintiff, or to her solicitor for her, the said sum of the plaintiff's costs, and then the said sum of thirty-four thousand six hundred and fifty-eight dollars, with interest thereon from this date, or so much thereof as the said proceeds will pay of the same, and that he take receipts for the amounts so paid and file them with his report, and that he bring the surplus moneys arising from such sale, if any there shall be, into court without delay to abide the further order of the court. And it is further ordered and decreed that the purchaser or purchasers of said premises at said sale be let into the possession thereof, and that any of the parties in this cause who may be in possession of said premises, or any part thereof,
171 and any person who since the commencement of this suit has come into possession under them or either of them, deliver the possession thereof to such purchaser or purchasers on production of the master's deed for such premises and a certified copy of the order confirming the report of the sale after such order has become absolute. And it is further ordered and decreed that if the moneys arising from such sale are insufficient to pay the amount so found due as aforesaid, with the

interest and costs aforesaid, that the master specify the amount of such deficiency in his report for further action thereon by this court.

And it is further ordered that in case a sale and conveyance of said premises be made under this decree, then that the defendants in this suit and all persons claiming or to claim by, from, through, or under them since the commencement of this suit, be and they are hereby enjoined and restrained from setting up or claiming any right, title, estate, or interest therein adverse to the complainant or the purchaser or purchasers at such sale, and those claiming under them, and that such injunction be and the same is hereby made perpetual.

172 And thereupon said Joseph Swift, Edwin Swift, Elizabeth and Ellen Carroll pray an appeal from the decree of this court herein to the Supreme Court of the United States, which is allowed to them on their filing bond according to law in the penal sum of twelve thousand dollars ($12,000), which bond shall be approved by the court, and which said bond when so filed shall stand and operate as a supersedeas herein.

And on the same day, to wit, the 6th day of October, A. D. 1877, the following certificate of evidence was filed in said clerk's office in said entitled cause, to wit:

Certificate of evidence.

United States circuit court, northern district of Illinois. In chancery.

JANET SMITH, ADMINISTRATRIX, &C.,
v.
NORMAN C. PERKINS, EDWIN AND JOSEPH Swift, George N. Williams, Obadiah Jackson, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon, The Mutual Benefit Life Insurance Company of Newark, New Jersey, Eli F. Hollister,
173 Selden H. Gorham, Nathan H. Walworth, receiver of the City National Bank, Franklin K. Orris, J. L. Orris, Isaac Meyer, Mayer Palintski, Aaron Barnett, John J. Morgan, and Bernard Ginsburg.

At a term of said court held on the 2nd day of October, A. D. 1877, at the court-house thereof in the city of Chicago, in said district.

Present, the honorable Thomas Drummond, judge.

Certificate of evidence.

This cause having come on to be heard upon the pleadings herein and the proofs taken by the respective parties, the complainant to maintain the issues on her part offered and read in evidence on said hearing the following documentary proofs and depositions, to wit:

First. A certain written instrument of Obadiah Jackson, dated the 18th day of April, A. D. 1871, payable two years after the date thereof, for the sum of $31,500.00, in words and figures following, namely:

$31,500.] CHICAGO, ILLS, *April 18th*, 1871.

Two years after date I promise to pay to David Smith or order at thirty-one thousand five hundred dollars for value received,

174 with interest at the rate of eight per cent. per annum, payable semi-annually, having deposited with him as collateral security a note of George N. Williams for thirty thousand dollars, secured by trust deed to Obadiah Jackson as trustee, which I hereby give the said David Smith authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter or before in the event of said securities depreciating in value, at public or private sale, at his discretion, without advertising the same or giving any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said collateral; and in case the proceeds of the sale of the said collateral shall not cover the principal, interest, and expenses, I promise to pay the deficiency forthwith after such sale.

OBADIAH JACKSON.

Interest on this note to be paid at the rate of nine per cent. per annum from 18th April, 1876; to be paid semi-annually.—B. H.

Know all men by these presents that I, the subscriber, am justly indebted to David Smith, upon a certain promissory notes bearing even date herewith, for the sum of thirty-one thousand five hundred
175 dollars, with interest after due at per cent. per annum, and due two years after date.

Now, therefore, in consideration of the premises, I do hereby make, constitute, and appoint J. N. Jewett or any attorney of any court of record to be my true and lawful attorney, irrevocably, for me and in my name, place, and stead, to appear in any court of record, in term time or in vacation, in any of the States or Territories of the United States at any time after said note becomes due, to waive the service of process and confess a judgment in favor of the said David Smith, or assigns, or assignees, upon the said note for the above sum, or for as much as appears to be due according to the tenor and effect of said note and interest thereon to the day of the entry of said judgment, together with costs and attorneys' fees; and also to file a cognovit for the amount that may be so due, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up of said judgment, or issuing the execution thereon;
176 and also to waive all benefit or advantage to which I may be entitled by virtue of any homestead or other exemption law now or hereafter in force in this State or Territory, where judgment may be entered by virtue hereof, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

Witness my hand and seal this 18th day of April, A. D. 1871.

OBADIAH JACKSON.

In presence of—

GEO. WATSON.

[Sixteen dollars ($16.00) int. rev. stamps, cancelled.]

(Endorsed:)

This note extended for $1.00 one year from 18th Ap'l, 1874.

10 % int. semi-an.

D. SMITH,
J. W.

NOV'R 4, 1871.—Received of Mr. Obadiah Jackson twelve hundred and sixty dollars, 6 months' int., due Oct. 18.

APRIL 18, 1722.—Rec'd six months' interest, $1,260, on within note.
D. SMITH.

Rec'd six months' int. on the within note till Oct. 18, 1872.
D. S.

Rec'd six months' int. on the within note till Ap'l 18, 1873.
D. S.

177 1873. OCT. 18.—Interest paid on the within note to date.
D. SMITH,
Pr. J. WATSON.

1874. AP'L 22.—Interest paid on the within note to 18 Ap'l, 1874.
D. SMITH,
Pr. JNO. WATSON.

1874. OCT. 17.—Interest paid on the within note to 18 Oct., '74.
D. SMITH,
Pr. JNO. WATSON.

1875. AP'L 19.—Interest paid on this note to Ap'l 18, 1875.
J. WATSON.

1875. OCT. 23.—Interest paid on the within note to 18th inst.

1876. AP'L 19.—Interest paid on within note to 18 Ap'l, 1876.
J. W.

1876. OCT. 26.—Rec'd $1,000 on a/c of interest.
J. W.

Second. A certain instrument in writing purporting to have been signed by George N. Williams, bearing date the 1st day of October, A. D. 1868, payable four years after the date thereof, for the sum of $30,000, in words and figures following, namely:

$30,000.]

CHICAGO, *October 1st*, 1868.

Four years after date, I, the subscriber, of Chicago, county of Cook, State of Illinois, promise to pay to Charles C. Waite or order,
178 thirty thousand dollars for value received, with interest at eight per cent. per annum payable semi-annually, at the bank of A. C. and O. F. Badger, in Chicago.

GEORGE N. WILLIAMS.

(On the margin:) This note secured by trust deed of even date herewith duly stamped.

Know all men by these presents, that I, the subscriber, am justly indebted to Charles C. Waite, upon a certain promissory note bearing even date herewith for the sum of thirty thousand dollars, with interest at eight per cent. per annum payable semi-annually, and due four years after date.

Now, therefore, in consideration of the premises, I do hereby make, constitute and appoint Obadiah Jackson, or any attorney of any court

of record, to be my true and lawful attorney irrevocably for me, and in my name, place and stead, to appear in any court of record, in term time or in vacation, in any of the States or Territories of the United States at any time after said note becomes due, to waive the service of process and confess a judgment in favor of the said Charles C. Waite, or his assigns or assignees, upon the said note for the above sum, or for as much as appears to be due according to the tenor and effect of said note and interest thereon to the day of the entry of said judgment, together with costs and one hundred dollars attorneys' fees; and
179 also to file a cognovit for the amount that may be so due, with an agreement therein that no writ of error or appeal shall be presented upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up said judgment, or issuing the execution thereon; and also to waive all benefit of or advantage to which I may be entitled by virtue of any homestead, stay, or other exemption law, now or hereafter in force in this or any State or Territory, where judgment may be entered by virtue hereof, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

Witness my hand and seal this first day of October, A. D. 1868.

GEORGE N. WILLIAMS. [SEAL].

In presence of—
OBADIAH JACKSON.

(Endorsed:)
Obadiah Jackson.

APRIL 27TH, 1869.—Twelve hundred dollars paid on this note, being interest to April 1st, 1869.

S. M. WAITE,
By O. JACKSON.

OCTOBER 1ST, 1869.—Twelve hundred dollars paid on this note, being interest to Oct. 1st, 1869.

S. M. WAITE,
By O. JACKSON.

180 Pay Silas M. Waite, or order.

CHARLES C. WAITE.

Pay to Obadiah Jackson, or order.

S. M. WAITE.

APRIL 1ST, 1870.—Twelve hundred dollars paid on this note, being interest to April 1st, 1870.
$1,200.

S. M. WAITE,
By O. JACKSON.

OCT. 1ST, 1870.—Twelve hundred dollars paid on this note, being interest to Oct. 1st, 1870.
$1,200.

S. M. WAITE,
By O. JACKSON.

MAY 17, 1871.—Interest paid on the within note to this date.

S. M. WAITE,
By O. JACKSON.

Third. A certain written instrument purporting to be a deed of trust, dated the first day of October, A. D. 1868, purporting to have been made by George N. Williams to Obadiah Jackson, to secure the payment of the said supposed note last described, of the property here in controversy, to wit, lots 15 and 16 in block 111 in the school section addition to Chicago, which said supposed deed is in words and figures following, namely:

This indenture made this first day of October, in the year of our Lord one thousand eight hundred and sixty-eight, between George
181 N. Williams, a batchelor, of Chicago, Illinois, of the first part, and Obadiah Jackson as trustee, of the same place, of the second part, witnesseth, that whereas the said party of the first part is justly indebted to Charles C. Waite, of the city and State of New York, in the sum of thirty-six thousand dollars, according to the tenor and effect of two certain promissory notes of even date, both of said notes payable to the said Charles C. Waite or order, and signed by the said George N. Williams; one of said notes being for the sum of six thousand dollars payable one year after date, and one of said notes being for thirty thousand dollars payable four years after date, both of said notes payable at the bank of A. C. and O. F. Badger, in the city of Chicago, Illinois, with interest at the rate of eight per centum per annum, payable semi-annually on the first days of April and October in each year, until the maturity of said promissory notes; the said sum of thirty-six thousand dollars being for a portion of the purchase money of the premises hereinafter described:

Now, therefore, this indenture witnesseth, that the said party of the first part, in order to secure the prompt and punctual payment of
182 the sums of money mentioned in the said promissory notes and the various instalments of interest thereon as the same shall respectively mature according to the tenor and effect of the said promissory notes, in consideration of the sum of one dollar, and the further sum of thirty-six thousand dollars in hand paid to said party of the first part by the said party of the second part, the receipt whereof is hereby acknowledged, has, and by these presents doth grant, bargain, sell, and convey unto the said party of the second part as trustee, and to his heirs and assigns or successors in trust forever, all of the following described lots, pieces or parcels of land situated in the city of Chicago, county of Cook, State of Illinois, and known and described as follows, to wit, lots numbered fifteen (15) and sixteen (16), in block number one hundred and eleven (111), in the school section addition to Chicago:

To have and to hold the said premises above described, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, his heirs and assigns, or successors, in trust forever:

In trust, nevertheless, that in case default shall be made in the
183 payment of the said sums of money mentioned in the said promissory notes, or of any of the instalments of interest on the same when the same shall respectively mature and become due and payable according to the tenor and effect of said promissory notes by the said party of the first part, or his legal representatives, that then, and in that case, upon application being made to the said party of the second part, or his successor in trust, by the legal holder of the promissory note aforesaid, upon which such default has been made in the payment of either the principal or interest mentioned therein, it shall and will be lawful for the said party of the second part to enter into and upon all

and singular the premises hereby granted or intended to be, and with or without such entry as the said party of the second part may elect after publishing a notice in a newspaper published in the city of Chicago, Cook County, Illinois, at least sixty days before the date of such sale, containing a description of the property to be sold and the time and place of sale, for him, the said party of the second part, to sell, at public auction, to the highest bidder, for cash, at the north door of the court-house in the city of Chicago, Cook County, Illinois, the
184 aforesaid promises and all of the right and equity of redemption of the said party of the first part, his heirs and assigns therein, at the time mentioned in such notice, and to adjourn such sale from time to time as he, said party of the second part, may elect, and to make, execute, and deliver to the purchaser or purchasers of said premises, at such sale, good and sufficient deeds of conveyance for the premises so sold, and out of the proceeds enuring from such sale to pay—

First. All costs and charges incurred in making such sale, including all traveling expenses, stamp fees, and other disbursements.

Second. To pay to the legal holder of said promissory note of such of them as shall at the time of said sale be due and owing, and unpaid, the amount of principal and interest which shall at that time remain owing on the same, and for that purpose it is expressly agreed by said party of the first part that in case of default in the payment of any part of said debt, and a sale is made as hereinbefore provided, that the whole sum of money secured by and mentioned in said promissory notes shall immediately, at the option of the legal holder of said notes, be-
185 come due and payable, anything in said notes contained to the contrary notwithstanding.

Third. In case there shall be any overplus remaining after paying the whole of said debt, then to pay the same to said party of the first part or his legal representatives.

And upon further trust upon the payment of the principal and interest mentioned in said promissory notes at the times when they shall respectively mature, then to reconvey said premises to said party of the first part at his cost.

And the said party of the first part doth, for himself, his heirs, executors, and administrators, covenant and agree to and with the said party of the second part that until the maturity and payment of the aforesaid promissory notes he will at all times keep the buildings situated on said premises insured against loss or damage by fire to the amount of at least thirty thousand dollars, with good and responsible fire insurance companies, such as shall be satisfactory to the said party of the second part, and that he will assign such policies from time to time to the said party of the second part to be held by him as collateral security
186 for the payment of the aforesaid sums of money secured to be paid by this trust deed, such insurance money, if there shall be any loss by fire, to be used by the said party of the second part under the direction of the said party of the first part in repairing or re-erecting such portion of said building as may be destroyed or injured by fire, and the same amount of insurance shall be kept at all times so assigned until the payment of all of said debt upon any future building that may be erected upon said premises. And the said party of the first part doth further covenant as aforesaid that he will, at all times during the continuance of the aforesaid debt, keep and maintain the said premises and the buildings thereon in good repair and condition, in accordance with the laws and ordinances of the city of Chicago and of the board of public works and health officers; also that he will pay promptly all taxes

and assessments levied upon or assessed on the same until the payment of said debt.

And the said party of the first part hereby expressly waives and releases any and all right, benefit, privilege, advantage, and exemp-
187 tion under and by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act of the general assembly, approved February 11th, A. D. 1851, entitled "An act to exempt homesteads from sale on execution," and an act approved February 17th, A. D. 1857, entitled "An act to amend an act to exempt homesteads from sale on execution."

And the said party of the first part for himself, his heirs, executors, and administrators, covenants with the said party of the second part that he is well seized of said premises in fee simple; that he has good right, full power, and lawful authority to grant, bargain, and sell the same in form aforesaid; that the same are free and clear from all incumbrances, and that he will, and his heirs, executors, and administrators shall forever warrant and defend the same against the lawful claims of all persons.

In witness whereof the said party of the first part has hereunto set his hand and seal this day and year first herein written.

GEORGE N. WILLIAMS. [SEAL.]

Signed, sealed and delivered in presence of—
D. M. SCOTT.
S. J. ANDREWS.

[U. S. rev. stamps. $36.00.]

188 STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

I, Francis A. Hoffman, jr., a notary public in and for said city and county in the State aforesaid, do hereby certify that George N. Williams (a batchelor), who is personally known by me to be the same person whose name is subscribed to the annexed trust deed, appeared before me this day in person, and acknowledged that he had signed, sealed and delivered the said instrument of writing as his free act and deed for the uses and purposes therein expressed.

Given under my hand and notarial seal this twelfth day of October, A. D. 1868.

[SEAL.] FRANCIS A. HOFFMAN, JR.,
Notary Public.

(Endorsed:) No. 187274. Recorded October 24, 1868, book 487 deeds, page 172. Wm. L. Church, cl'k.

Fourth. A certain deed made by Charles V. Dyer to Obadiah Jackson, dated the 1st day of June, A. D. 1872, in words and figures following, namely:

C. V. D.

Warranty deed.

189 [Internal revenue stamp, $1.00.]

This indenture, made this first day of June, in the year of our Lord one thousand eight hundred and seventy-two, between Charles V. Dyer and Louisa M. Dyer, his wife, of Chicago, Illinois, party of the

first part, and Obadiah Jackson, of the same place, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar in hand paid by the said party of the second part (the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom), ha' granted, bargained, sold, remised, released, conveyed, aliened and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien and confirm unto the said party of the second part, and to his heirs and assigns forever, all the following described lots, pieces or parcels of land situated in the county of Cook and State of Illinois, to wit, lots fifteen (15) and sixteen (16) in block one hundred and eleven (111), in the school section addition to Chicago:

Together with all and singular the hereditaments and appur-
190 tenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, dower, right of dower, claim or demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances:

To have and to hold the premises above granted and described, with the appurtenances, unto the party of the second part, his heirs and assigns forever.

And the said Charles V. Dyer, party of the first part, for himself, his heirs, executors and administrators, does covenant, grant, bargain and agree to and with the party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature
191 soever; and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof the party of the first part shall and will warrant and forever defend, subject, nevertheless, to a trust deed given by George N. Williams, dated October 1st, 1868, recorded in book 487 of deeds, page 172, to secure a certain note on which is due $50,000 and interest.

Also subject to a trust deed to James B. Runnion, trustee, dated May 17th, 1871, duly recorded in the recorder's office of Cook County, Illinois, the payment of both of which incumbrances is hereby assumed by the party of the second part.

Also subject to all taxes and assessments hereafter to be made on said premises, which are to be paid by the party of the second part.

And the party of the first part, for the consideration above mentioned, do hereby expressly waive and release all right and benefit which he ha' in and to said premises, or to which he may be entitled under and by virtue of an act entitled "An act to exempt homesteads from sale on execution," approved February 11th, A. D. 1851,
192 and also an act entitled "An act to amend an act to exempt homesteads from sale on execution," approved February 17th, 1857, as well as any and all other acts of a like character, or for a similar purpose.

In witness whereof the said party of the first part hereunto set their hands and seals the day and year first above written.

CHARLES V. DYER. [SEAL.]
LOUISA M. DYER. [SEAL.]

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

I, William O. Cole, a notary public in and for said city, in said county, in the State aforesaid, do hereby certify that Charles V. Dyer and Louisa M. Dyer, his wife, who are personally known to me as the same persons whose names are subscribed to the annexed instrument of writing, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

And the said Louisa M. Dyer, wife of the said Charles V. Dyer, having been by me examined separate and apart, and out of hearing
193 of her said husband, and the contents and meaning of the said instrument of writing having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same and relinquished her dower and all her right, title and interest in and to the lands and tenements therein mentioned, and expressly waived and released all right, claim, benefit, privilege, advantage and exemption under any and all homestead exemption laws so called, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this fourteenth day of June, A. D. 1872.

[SEAL.] WILLIAM O. COLE,
Notary Public.

(Endorsed:) Doc. No. 37063. Filed for record in the recorder's office of Cook County, Illinois, on the 18 day of June, A. D. 1872, and duly recorded in book 105 of records, page 197. Norman T. Gassette, clerk.

Fifth. The deposition of George Watson, as already copied in record from State court.

194 The complainant here rested his case, except as to documentary evidence, and thereupon the defendants Edwin and Joseph Swift and Elizabeth and Ellen Carroll, to maintain the issues on their part, offered and read in evidence at said hearing the following documentary proofs and depositions, namely:

First. A certain deed, dated the 2d day of October, A. D. 1871, made by Obadiah Jackson to Charles V. Dyer, in words and figures following, namely:

Know all men by these presents that I, Obadiah Jackson, trustee, of Chicago, in the county of Cook and State of Illinois, in consideration of the sum of one dollar to me in hand paid, receipt whereof is hereby specially acknowledged, and for other good and valuable considerations, have granted, and do hereby grant, remise, convey, release, and quitclaim unto Charles V. Dyer, of the same place, all right, title, interest, claim, and demand which I may have acquired in, through, or by a certain trust deed bearing date the first day of October, A. D. 1868, duly recorded in the office of the recorder of Cook County, State of Illinois, in book number 487 of deeds, at page 172, to the premises therein described, namely: Lots fifteen (15) and sixteen (16) in block one hun-

dred and eleven (111) in the school section addition to Chicago,
195 in Cook County, Illinois, which trust deed was made to secure the payment of the sum of thirty-six thousand dollars, evidenced by two certain promissory notes, bearing even date therewith, from George N. Williams to C. C. Waite.

Witness my hand and seal this second day of October, A. D. 1871.

OBADIAH JACKSON, [SEAL.]
Trustee.

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

Alexander Siller, a notary public in said county, in the State aforesaid, do hereby certify that Obadiah Jackson, who is personally known to me as the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this third day of August, A. D. 1872.

[SEAL.] ALEXANDER SILLER,
Notary Public.

196 (Endorsed:) St. James Hotel. Release deed. Obadiah Jackson to C. V. Dyer.

47467.

STATE OF ILLINOIS,
Cook County, ss:

This is to certify that the within written instrument was filed for record in the recorder's office of said county the 3 day of July, A. D. 1872, at M., and duly recorded in book 5 of records, page 597.

NORMAN T. GASSETTE,
Recorder.

James Cockcroft & Co., 499 Wabash avenue, Chicago.

Second. A certain deed dated the 1st day of June, A. D. 1872, made by Obadiah Jackson and A. Amelia, his wife, to Norman C. Perkins to secure the payment of the two bonds next hereinafter described, which said deed is in words and figures following, namely:

This indenture, made this first day of June, in the year of our Lord one thousand eight hundred and seventy-two, between Obadiah Jackson and A. Amelia Jackson, his wife, of the city of Chicago, in the State of Illinois, party of the first part, and Norman C. Perkins,
197 of the same place, trustee, party of the second part.

Whereas said Obadiah Jackson is justly indebted unto Joseph Swift, of the city of Philadelphia, in the State of Pennsylvania, in the sum of twenty-five thousand dollars ($25,000.00), secured to be paid by the certain bond of the said Obadiah Jackson, bearing even date herewith, in the penal sum of fifty thousand dollars ($50,000.00), conditioned for the payment unto the said Joseph Swift, his executors, administrators, or assigns, of the sum of twenty-five thousand dollars ($25,000.00), on the first day of June, in the year of our Lord one thousand eight hundred and seventy-seven, with interest thereon from the day of the date of the said bond at the rate of nine (9) per centum per annum, to be paid half yearly, to wit, on the first day of each of the months of December and June in each and every year until the said principal sum shall be fully paid; which said interest payments, until the said princi-

pal sum shall become due, are specified in and further secured by ten (10) coupons given herewith, and the said payments both of principal and interest are to be made at such place in the city of Philadelphia, in the State of Pennsylvania, as the said Joseph Swift, his executors,
198 administrators, or assigns, may from time to time in writing appoint; and in default of such appointment, then at the Philadelphia National Bank, in said city of Philadelphia, under which bond there is a proviso written whereby it is agreed that if default be made in the payment of any of the interest on the said principal sum, payable half yearly as aforesaid, and any portion thereof shall remain due and unpaid for the space of twenty (20) days after the same shall become due and payable according to the condition of the said bond as aforesaid, then and in that case the principal sum above mentioned, with all arrearages of interest thereon, shall, at the option of the said Joseph Swift, his executors, administrators, or assigns, at once become due and payable, and shall be collectable without notice immediately or at any time after such default, anything thereinbefore contained to the contrary notwithstanding.

And whereas said Obadiah Jackson is also justly indebted unto Edwin Swift, of said city of Philadelphia, in the sum of twenty-five thousand dollars ($25,000.00), secured to be paid by the certain bond of the said Obadiah Jackson, bearing even date herewith, in the penal sum of fifty thousand dollars ($50,000.00), conditioned for the payment unto the said Edwin Swift, his executors, administrators or assigns, of the
199 sum of twenty-five thousand dollars ($25,000.00) on the first day of June, in the year of our Lord one thousand eight hundred and seventy-seven, with interest thereon from the day of the date of the said bond at the rate of nine (9) per centum per annum, to be paid half-yearly, to wit, on the first day of each of the months of December and June, in each and every year, until the said principal sum shall be fully paid, which said interest payments, until the said principal sum shall become due, are specified in and further secured by ten (10) coupons given herewith, and the said payments both of principal and interest are to be made at such place in the city of Philadelphia, in the State of *Philadelphia*, as the said Edwin Swift, his executors, administrators, or assigns, may from time to time in writing appoint; and in default of such appointment then at the Commercial National Bank in said city of Philadelphia, under which bond there is a proviso written whereby it is agreed that if default be made in the payment of any of the interest on the said principal sum payable half-yearly as aforesaid, and any portion shall remain due and unpaid for the space of twenty (20) days after the same shall become due and payable according to the condition of the
200 said bond as aforesaid, then and in that case the principal sum above-mentioned, with all arrear ages of interest thereon, shall at the option of the said Edwin Swift, his executors, administrators, or assigns, at once become due and payable, and shall be collectable without notice immediately, or at any time after such default, anything thereinbefore contained to the contrary notwithstanding.

Now, therefore, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said principal sums of money with interest thereon according to the true intent and meaning of the said two several bonds, and also in consideration of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the

second part, his successors in trust and assigns, forever, all the certain lots, pieces, or parcels of land situate, lying and being in the city of Chicago, in the county of Cook and State of Illinois, and known and described as follows, to wit: Lots numbered fifteen (15) and sixteen (16), in
201 block one hundred and eleven (111) of the school section addition to Chicago.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, dower, and right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the same and every part and parcel thereof with the appurtenances.

To have and to hold the above granted, bargained and described premises with the appurtenances unto the said party of the second part, his successors in trusts and assigns forever.

In trust nevertheless that if default shall be made in the said principal sums of money, or of either of them, or the interest that may accrue thereon, or any part thereon, when the same become due and payable, either by election of the legal holder or holders of the said bonds or either of them under the provisions of the said bonds, or of this instrument, or by the maturity of the said bonds, or of either of them,
202 or if the said Obadiah Jackson, his heirs, executors, or administrators shall at any time until said principal sum and all arrearages of interest thereon shall be fully paid, suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, or shall do or permit to be done to, in, upon, or about said premises anything that may in anywise tend to diminish the value thereof, or to impair, weaken or diminish the security intended to be effected under and by virtue of this instrument, or shall neglect to keep all buildings upon said premises insured, and the policies of insurance delivered to said party of the second part, or his successors in trust as hereinafter provided, or shall fail in anywise to fully keep and perform all and singular the covenants and agreements hereinafter contained; that then and from henceforth it shall be lawful for the said party of the second part or his successors in trust, on application of the legal holder or holders of said bonds, or of either of them, with or without a previous entry upon said premises, to sell and dispose of the premises hereby granted, or intended so to be, and all right, title, benefit, and equity of redemption of the said party of the first part, their heirs or assigns therein, at public auction in the
203 said city of Chicago, to the highest bidder for cash, having first given twenty (20) days' notice of the time and place of said sale by advertisement in any one of the daily newspapers that may then be published in the English language in the said city of Chicago, personal notice of such sale to said party of the first part, their heirs, executors, administrators, or assigns, or any and all persons claiming by, through, or under them, being hereby expressly waived and excused, and in the name or names of the said party of the second part, or his successors in trust, to make, execute, and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance for the premises sold, in the law, for the same, in fee simple, and out of the money arising from such sale to pay and retain—

First. All charges and expenses made or sustained on account of this trust, including the expenses of said advertisement, sale, and conveyance, commissions on such sale, and all moneys that the said party of the second part or his successors in trust may have advanced for insur-

ance, taxes, and redemption from tax sales, on the said premises, or to protect his or their title thereto in any manner whatever, with
204 interest on said advances at ten (10) per centum per annum.

Second. All of said principal sums of money and accrued interest thereon that may at the time of such sale remain unpaid, whether due or not due.

Third. Rendering the overplus, if any there be, unto the said Obadiah Jackson, his executors, administrators, or assigns, upon reasonable request.

And the said party of the second part, or his successors in trust, may adjourn such sale from time to time and for such time as he or they may judge best, and may also at such sale sell the said premises entire, without division, or in parcels, in his or their discretion. And it shall not be obligatory upon the purchaser or purchasers at such sale to see to the application of the purchase money. Which sale so made shall be a perpetual bar, both in law and equity, against the said party of the first part, their heirs and assigns and all persons claiming or to claim the said premises or any part thereof by, from, through or under them or any of them. And the said party of the first part agree to surrender possession of the said premises to the purchaser or purchasers at such sale peaceably on demand.

And if the said party of the second part, or his successors in
205 trust, shall at any time advance money for insurance on said premises, or to pay taxes thereon, or to redeem from tax sales of the same, or to protect his or their title thereto in any manner whatever, such advances shall be a charge upon the said premises and may be collected with interest thereon in the manner hereinbefore provided.

And the said Obadiah Jackson, for himself, his heirs, executors, and administrators, doth covenant, grant, bargain, and agree to and with the said party of the second part, his successors in trust and assigns, that at the time of the ensealing and delivering of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee simple; and hath good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind and nature soever; and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his successors in trust and assigns, against all and every other person and persons
206 lawfully claiming or to claim the whole or any part thereof the said Obadiah Jackson will warrant and forever defend.

And that until the said principal sum of money and all arrearages of interest thereon shall be fully paid, he will pay or cause to be paid all taxes and assessments on the said premises when the same become due and payable; and that he will not do or permit to be done to, in, upon, or about the said premises anything that may in anywise tend to diminish the value thereof or to weaken or impair the security intended to be effected hereon and by virtue of this instrument. And that he will keep all buildings upon the said premises insured in such good and reliable insurance company or companies as the said party of the second part or his successors in trust may select for the insurable value thereof; the policy or policies of such insurance to be either in the name or names of the said party of the second part, or his successors in trust, or to be so drawn that the loss, if any, shall be payable to him or them and to be held by him or them as additional security thereto; but such

insurance shall not at any time be required for a greater sum
207 than the amount of the said indebtedness then remaining unpaid.

A reconveyance of said premises to be made to said Obadiah Jackson, his heirs or assigns, at his or their expense, on full payment of the indebtedness aforesaid and performance of the covenants and agreements made herein by the said party of the first part.

And in case of the death, absence, inability or refusal to act of said party of the second part, then J. Henry Truman, of the said city of Chicago, shall be and he hereby is appointed and made successor in trust to said party of the second part under this deed with like powers and authority, and said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

And in case of the death, absence, inability, or refusal to act of said party of the second part and of the said J. Henry Truman, then Michael W. Robinson, of the said city of Chicago, shall be and he is hereby appointed and made successor in trust to said party of the second part and of the said J. Henry Truman under this deed with like powers and authority, and said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

208 In witness whereof the said party of the first part have hereunto set their hands and seals, at the said city of Chicago, the day and year first above written.

OBADIAH JACKSON. [SEAL.]
A. AMELIA JACKSON. [SEAL.]

[Int. rev. stamp, $50.00.]

STATE OF ILLINOIS,
Cook County, ss :

I, Albion Cate, a notary public in and for said city of Chicago, in the State aforesaid, do hereby certify that Obadiah Jackson and A. Amelia Jackson, his wife, who are personally known by me to be the same persons whose names are subscribed to the annexed trust deed, appeared before me this day in person and acknowledged that they had signed, sealed, and delivered the said instrument of writing as their free act and deed for the uses and purposes therein expressed.

And the said A. Amelia Jackson, wife of the said Obadiah Jackson, having been by me examined separate and apart and out of hearing of her husband, and the contents and meaning of the said instrument
209 of writing having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same without any compulsion of her said husband, and relinquished her dower to the lands and tenements therein mentioned, and that she does not wish to retract the same.

Given under my hand and notarial seal this 29 day of June, A. D. 1872.

[SEAL.] ALBION CATE,
Notary Public.

(Endorsed :) 47465.

STATE OF ILLINOIS,
Cook County, ss :

This instrument was filed for record on the 3 day of August, A. D. 1872, as document No. , and duly recorded in book 117 of records, at page 53.

NORMAN T. GASSETTE,
Recorder of Deeds.

Third. A certain bond of Obadiah Jackson, dated the first day of June, A. D. 1872, in the penal sum of fifty thousand dollars, conditioned for the payment of the sum of twenty-five thousand dollars on the
210 first day of June, A. D. 1877, to Joseph Swift, which said bond is in words and figures following, namely:

(On the margin:) Coupons for payment of interest are given herewith.

Know all men by these presents that I, Obadiah Jackson, of the city of Chicago, in the State of Illinois, am held and firmly bound unto Joseph Swift, of the city of Philadelphia, in the State of Pennsylvania, in the penal sum of fifty thousand dollars, lawful money of the United States of America, to be paid unto the said Joseph Swift, his executors, administrators, or assigns, for which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators firmly by these presents, sealed with my seal and dated at Chicago, in the State of Illinois, this first day of June, in the year of our Lord one thousand eight hundred and seventy-two.

The condition of this obligation is such that if the above bounden Obadiah Jackson, his heirs, executors, or administrators shall and do well and truly pay, or cause to be paid, unto the said Joseph Swift, his executors, administrators, or assigns, the sum of twenty-five thousand dollars on the first day of June, which will be in the year of our Lord one thousand eight hundred and seventy-seven, with interest for
211 the same, to be computed from the day of the date hereof at and after the rate of nine per centum per annum, which interest shall be paid half yearly, to wit, on the first day of each of the months of December and June, which will be in each and every year until the said principal sum shall be fully paid, which said interest payments, until the said principal sum shall become due, are specified in and further secured by ten coupons given herewith, and the said payments, both of principal and interest, shall be made at such place in the city of Philadelphia, in the State of Pennsylvania, as the said Joseph Swift, his executors, administrators, or assigns may, from time to time, in writing appoint; and in default of such appointment, then, at the Philadelphia National Bank, in said city of Philadelphia, then and in such case this bond to be void; otherwise to remain in full force and virtue.

Provided, nevertheless, and it is hereby expressly agreed and fully understood, that if default be made in the payment of any of the interest on the principal sum above mentioned, payable half yearly as aforesaid, and any portion thereof shall remain due and unpaid for the space of twenty days after the same shall become due and payable ac-
212 cording to the above condition, then and in that case the principal sum above mentioned, together with all arrearages of interest thereon, shall, at the option of the said Joseph Swift, his executors, administrators, or assigns, thereupon become due and payable, and shall be collectable without notice, immediately, or at any time after any such default, anything hereinbefore contained to the contrary notwithstanding.

It is hereby expressly declared that this bond or obligation is made under, and is in all respects to be construed by, the laws of the State of Illinois, and is given for an actual loan of money made at the said city of Chicago by the said Joseph Swift to the said Obadiah Jackson on the day of the date hereof.

OBADIAH JACKSON. [SEAL.]

This bond is secured by deed of trust properly stamped.

$1,125.00.

Due Joseph Swift, or order, eleven hundred and twenty-five dollars on the first day of June, A. D. 1877, without grace, payable at such place in the city of Philadelphia, in the State of Pennsylvania, as he, his executors, administrators, or assigns may in writing appoint; and in default of such appointment, then, at the Philadelphia National Bank, in said city of Philadelphia, being for the payment of the half yearly in-
213 terest due that day on my bond to said Joseph Swift, of this date, conditioned for the payment of twenty-five thousand dollars on the first day of June, A. D. 1877.

Chicago, June 1st, 1872.

OBADIAH JACKSON.

No. 10.

Whereas I, Obadiah Jackson, of the city of Chicago, in the State of Illinois, justly indebted unto Joseph Swift, of the city of Philadelphia, in the State of Pennsylvania, in the sum of twenty-five thousand dollars, an actual loan of money, made to me at Chicago, and secured to be paid by my bond, bearing even date herewith, in the penal sum of fifty thousand dollars, but conditioned in effect for the payment of the sum of twenty-five thousand dollars on the first day of June, in the year of our Lord one thousand eight hundred and seventy-seven, with interest for the same at the rate of nine per centum per annum, payable half yearly, both principal and interest payable at such place in the city of Philadelphia, in the State of Pennsylvania, as the said Joseph Swift, his executors, administrators, or assigns may, from time to time, in writing appoint; and in default of such appointment, then, at the Philadelphia National Bank, in said city of Philadelphia, with a proviso there-
214 under written that if default be made in the payment of the interest payable half yearly as aforesaid, and any portion thereof shall remain due and unpaid for the space of twenty days after the same shall become due and payable according to said condition, then and in that case the principal sum aforesaid, with all arrearages of interest thereon, shall, at the option of the said Joseph Swift, his executors, administrators, or assigns thereupon, become due and payable, and shall be collectable without notice immediately, or at any time after any such default, anything hereinbefore expressed to the contrary notwithstanding.

Now, therefore, know all men by these presents that I, the said Obadiah Jackson, for the purpose of securing the prompt and punctual payment of the said principal sum of money, and of the interest thereon, according to the true intent and meaning of the said bond, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Norman C. Perkins, or any other attorney of any court of record in the United States of America, to be my true and lawful attorney irrevocable, for me and in my name, place, and stead, to appear in any court of record, in term time or vacation, in any of the States, Territories, or districts of the United States, at any time after default shall have been made
215 in the payment of the said principal sum, or of either of said half-yearly instalments of interest, or any part thereof, according to the true intent and meaning of said condition of said bond, and the proviso thereto, to waive service of process, accept a declaration, and confess a judgment in favor of the said Joseph Swift, his executors, administrators or assigns upon said bond for so much of principal and interest as shall at the time of the entry of such judgment be and remain unpaid upon said bond, due or not due, according to the true intent and mean-

ing of the condition of said bond and the proviso thereto, together with all costs, charges, and a reasonable sum in addition thereto, as an attorney's fee; and for such purpose to file a cognovit for such amounts, with an agreement therein that execution may issue forthwith, and that no writ of appeal shall be prosecuted upon such judgment, nor any bill in equity filed, or any other proceeding had to interfere in any manner with the operation of such judgment, nor any motion made to quash, set aside, or stay any execution that may be issued thereon. And further, the said attorney is hereby empowered, at his option, in case of default being made or suffered in the payment of any of the interest
216 coupons when due and payable, to waive service of process, and confess a judgment in favor of said Joseph Swift, his executors, administrators or assigns, upon such of the coupons given with said bond for the payment of the interest thereon as shall at such time be due by the terms thereof and then remaining unpaid, for so much money as may then be due thereon, according to the tenor thereof, together with all costs and charges, and a reasonable sum in addition for each of such coupons as an attorney's fee, hereby ratifying and confirming all that my said attorney may legally do under and by virtue hereof.

Witness my hand and seal, at Chicago aforesaid, this first day of June, A. D. 1872.

OBADIAH JACKSON. [SEAL.]

Fourth. A certain bond of Obadiah Jackson, dated the 1st day of June, A. D. 1872, in the penal sum of fifty thousand dollars conditioned for the payment of the sum of forty-five thousand dollars on the 1st day of June, A. D. 1877, to Edwin Swift, which said bond is in words and figures following, namely:

(On the margin:) Coupons for the payment of interest are given herewith.

Know all men by these presents that I, Obadiah Jackson, of the city of Chicago, in the State of Illinois, am held and firmly bound unto
217 Edwin Swift, of the city of Philadelphia, in the State of Pennsylvania, in the penal sum of fifty thousand dollars, lawful money of the United States of America, to be paid unto the said Edwin Swift, his executors, administrators or assigns, for which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated at Chicago, in the State of Illinois, this first day of June, in the year of our Lord one thousand eight hundred and seventy-two.

The condition of this obligation is such that if the above bounden Obadiah Jackson, his heirs, executors or administrators, shall and do well and truly pay, or cause to be paid, unto the said Edwin Swift, his executors, administrators or assigns, the sum of twenty-five thousand dollars on the first day of June, which will be in the year of our Lord one thousand eight hundred and seventy-seven, with interest for the same, to be computed from the day of the date hereof, at and after the rate of nine per centum per annum, which interest shall be paid half yearly, to wit, on the first day of each of the months of December and June, which will be in each and every year until the said principal sum shall be fully paid, which said interest payments until the
218 said principal sum shall become due, are specified in and further secured by ten coupons given herewith, and the said payments, both

of principal and interest, shall be made at such place in the city of Philadelphia, in the State of Pennsylvania, as the said Edwin Swift, his executors, administrators or assigns, may, from time to time, in writing appoint, and in default of such appointment, then at the Commercial National Bank, in the said city of Philadelphia, then and in such case this bond to be void, otherwise to remain in full force and virtue.

Provided, nevertheless, and it is hereby expressly agreed and fully understood, that if default be made in the payment of any of the interest on the principal sum above mentioned, payable half yearly, as aforesaid, and any portion thereof shall remain due and unpaid for the space of twenty days after the same shall become due and payable, according to the above condition, then and in that case the principal sum above mentioned, together with all arrearages of interest thereon, shall, at the option of the said Edwin Swift, his executors, administrators or assigns, thereupon become due and payable, and shall be collectable without notice, immediately, or at any time after any such default, anything hereinbefore contained to the contrary notwithstanding.

219 It is hereby expressly declared that this bond or obligation is made under, and is in all respects to be construed by, the laws of the State of Illinois, and is given for an actual loan of money made at the said city of Chicago by the said Edwin Swift to the said Obadiah Jackson on the day of the date hereof.

OBADIAH JACKSON. [SEAL.]

This bond is secured by deed of trust properly stamped.

$1,125.00.

Due Edwin Swift, or order, eleven hundred and twenty-five dollars on the first day of June, A. D. 1877, without grace, payable at such place in the city of Philadelphia, in the State of Pennsylvania, as he, his executors, administrators or assigns may in writing appoint; and in default of such appointment, then at the Commercial National Bank, in said city of Philadelphia, being for the payment of the half yearly interest due that day on my bond to said Edwin Swift, of this date, conditioned for the payment of twenty-five thousand dollars on the first day of June, A. D. 1877.

Chicago, June 1st, 1872.

OBADIAH JACKSON.

Whereas I, Obadiah Jackson, of the city of Chicago, in the State of Illinois, am justly indebted unto Edwin Swift, of the city of Philadelphia, in the State of Pennsylvania, in the sum of twenty-five thousand

220 dollars, an actual loan of money, made to me at Chicago, and secured to be paid by my bond, bearing even date herewith, in the penal sum of fifty thousand dollars, but conditioned in effect for the payment of the sum of twenty-five thousand dollars on the first day of June, in the year of our Lord one thousand eight hundred and seventy-seven, with interest for the same at the rate of nine per centum per annum, payable half yearly; both principal and interest payable at such place in the city of Philadelphia, in the State of Pennsylvania, as the said Edwin Swift, his executors, administrators or assigns, may from time in writing appoint; and in default of such appointment, then at the Commercial National Bank, in said city of Philadelphia, with a proviso thereunder written, that if default be made in the payment of the interest payable half yearly, as aforesaid, and any portion thereof shall remain due and unpaid for the space of twenty days after the same

shall become due and payable according to said condition, then and in that case the principal sum aforesaid, with all arrearages of interest thereon, shall, at the option of the said Edwin Swift, his executors, administrators or assigns, thereupon become due and payable, and
221 shall be collectable without notice, immediately, or at any time after any such default, anything thereinbefore expressed to the contrary notwithstanding.

Now, therefore, know all men by these presents, that I, the said Obadiah Jackson, for the purpose of securing the prompt and punctual payment of the said principal sum of money and of the interest thereon according to the true intent and meaning of the said bond have made, constituted, and appointed, and by these presents do make, constitute, and appoint Norman C. Perkins or any other attorney of any court of record in the United States of America to be my true and lawful attorney, irrevocable, for me and in my name, place, and stead to appear in any court of record in term time or vacation in any of the States, Territories, or districts of the United States at any time after default shall have been made in the payment of the said principal sum or of either of said half-yearly installments of interest or any part thereof according to the true intent and meaning of said condition of said bond and the proviso thereto, to waive service of process, accept a declaration, and confess a judgment in favor of the said Edwin Swift, his executors, administrators, or assigns upon said bond for so much of principal and
222 interest as shall at the time of the entry of such judgment be and remain unpaid upon said bond due or not due, according to the true intent and meaning of the condition of said bond and the proviso thereto, together with all costs, charges, and a reasonable sum in addition thereto as an attorney's fee; and for such purpose to file a cognovit for such amounts with an agreement therein that execution may issue forthwith, and that no writ of appeal shall be prosecuted upon such judgment, nor any bill in equity filed, or any other proceeding had to interfere in any manner with the operation of such judgment nor any motion made to quash, set aside, or stay any execution that may be issued thereon. And further the said attorney is hereby empowered, at his option, in case of default being made or suffered in the payment of any of the interest coupons when due and payable, to waive service of process and confess a judgment in favor of said Edwin Swift, his executors, administrators, or assigns upon such of the coupons given with said bond for the payment of the interest thereon as shall at such time be due by the terms thereof, and then remaining unpaid, for so much money as may then be due thereon according to the tenor thereof, together with all costs and charges and a reasonable sum in ad-
223 dition for each of such coupons as an attorneys' fee, hereby ratifying and confirming all that my said attorney may legally do under and by virtue thereof.

Witness my hand and seal at Chicago aforesaid this first day of June, A. D. 1872.

OBADIAH JACKSON. [SEAL.]

Fifth. A deposition of Francis A. Hoffman, jr., as already copied from State court.

Sixth. A deposition of John Watson as already copied in record from State court.

Seventh. A deposition of Adolph Heile as already copied in record from State court.

Eighth. A deposition of Charles C. Waite as already copied in record from State court.

Ninth. A deposition of Silas M. Waite as already copied in record from State court.

Tenth. A stipulation by the complainant admitting that all of the endorsements upon the Williams note are in the handwriting of Obadiah Jackson, except the following words "Pay Silas M. Waite or order, Charles C. Waite," and the signature "S. M. Waite" over which is written in Jackson's writing "Pay to Obadiah Jackson or order," which said stipulation was in words and figures as in the record from the State court.

224 This was all the testimony offered by the said last named defendants, and thereupon to further maintain the issues on her part the said complainant at said hearing offered and read in evidence the following depositions and documentary proofs, namely:

First. A deposition of Thomas Parker, as already copied from the record from State court.

Second. A deposition of Charles V. Dyer, as already copied from the record from State court.

Third. A deposition of Norman C. Perkins.

Fourth. A deposition of Lorenzo C. Hommes.

And fifth. A deposition of Bernard Callaghan.

These last three depositions are reported by Henry Waller, examiner, and on file, as follows:

Deposition of Norman C. Parkins taken on behalf of the complainant before Henry Waller, examiner, at Chicago on August 25, 1877.

Deposition of Norman C. Perkins.

Q. Are you the Norman C. Perkins named in a certain deed of trust made by Obadiah Jackson to you as trustee for Edwin and Joseph Swift?

A. Dated June first, 1872, yes, sir.

Q. Were you the attorney employed to examine the title for the Swifts in making that loan?

A. Yes, sir.

225 (Counsel for defendants admits that the deed of trust testified to by the witness is the one under which the defendants Edwin and Joseph Swift claim herein.)

Q. Do you know what property that deed of trust covered?

A. Yes, sir; it was the property known then as the St. James Hotel. It was previously known by another name. The Burnett House it was called, I think, before the fire.

Q. And it was known formerly by its former name? It has been known by three or four different names?

A. Yes.

Q. What was it called when it belonged to Dr. Dyer—the same name?

A. I don't know when it belonged to him exactly, but before the fire I think it was called the Burnett House.

Q. You knew that Jackson bought it from him?

A. Yes; by the way the title runs.

Q. Did you examine the abstract of that title?

A. I did.

Q. From whom dids—tate what that abstract is.

A. Well, I don't know. I presume I gave it to Mr. Field who negotiated the loan for the Swifts. I haven't it.

Q. Do you know from whom Obadiah Jackson obtained the title to that property?

A. Only as the abstract showed it.

Q. Who was the grantor of Jackson?

A. I could not remember that only by a reference to my notes. (Witness here refers to said notes or memoranda.) They indicate
226 that the deed came from Charles V. Dyer.

Q. Will you let me see the notes, please?

A. Yes.

(Here counsel refers to said notes.)

Q. State—state whether from the abstract—you made a minute of the title from that abstract in your memorandum-book, in examining the title.

A. Yes, sir. I made a memorandum of conveyances examined for my own convenience. I noted them all down, as I usually do.

Q. State whether or not you have before you the memorandum-book that you made those entries in from the abstract furnished you by Mr. Field, the agent of the Swifts.

A. I have; yes, sir. I have the memorandum here, that I made at that time.

Q. In your own handwriting?

A. Yes.

Q. Will you please state from whom Obadiah Jackson obtained the title, or who was the grantor?

A. I think that was answered before; it is shown by my minutes here. It came from Dyer to him.

Q. What was the date of that deed?

A. June first, 1872.

Q. Does it show when it was recorded?

A. It does not; my minutes do not.

Q. Is that the deed? Charles V. Dyer to Obadiah Jackson.

(Here counsel points to the deed referred to.)

227 A. I can only tell from the date. I do not think I ever saw the deed before.

Q. Didn't you have the deed from Dyer to Jackson?

A. I don't think I did; it was shown on the abstract.

Q. It was shown on the abstract?

A. Yes, sir.

Q. The deed from Dyer to Jackson was shown on the abstract?

A. Yes, sir; it was brought down to June 29, 1872.

Q. Does it show when it was recorded?

A. Yes; the memorandum on the back, says 18th of June, 1872.

Q. Yes. Is that admitted to be the original deed from Dyer to Jackson? We simply want it identified. Of course it saves time, that does. I only want to shew that this was the deed which was put in evidence. This is a deed which has the initials C. V. D., for C. V. Dyer, marked upon it. State whether this is the deed which appears in your abstract, June first 1872.

Mr. SKINNER. Well, that appears in the evidence.

A. From my memorandum of that deed, I can only tell as to the date. It was of the same date.

Q. It is of the same date?

A. Yes; and covers the same property.

Q. This deed is marked Exhibit 5, is it?

228 A. This deed you show me is marked Exhibit 5.

Q. With the initials "C. V. D."?

A. Yes, sir.

Q. And that corresponds to the date you have on your abstract, from C. V. Dyer to Obadiah Jackson?

A. The abstract shows the deed from Charles V. Dyer to Obadiah Jackson, dated June 1, 1872.

Q. From whom did *from whom did* Charles V. Dyer obtain the title of that, according to the abstract you have before you or from your minutes of it?

A. From Mary P. Moody.

Q. What is the date of that deed?

A. May 17, 1871.

Mr. SKINNER. It is understood that the witness is testifying solely from the minutes, I suppose?

Mr. HIGGINS. He is testifying to what appears from that abstract from his minutes.

A. Afterwards there was a quitclaim deed made by Mary P. Moody to Dr. Dyer, of the same property, which may have borne a different date.

Q. From whom did Mary P. Moody acquire the title according to that abstract that was presented to you by Swift's agent?

A. George N. Williams.

Q. What is the date of that deed?

A. October 5, 1868.

229 Q. From whom did George N. Williams acquire the title according to the abstract furnished you by the agent of Williams?

A. Charles C. Waite.

Q. The date of that deed?

A. October 1, 1868.

Q. When did you file a release from—I ask you whether you have before you the trust deed to Obadiah Jackson, dated—did you have before you in the abstract a memorandum of the trust deed made to Obadiah Jackson by George N. Williams, dated October first, 1868?

A. The abstract showed such a trust deed.

Q. Recorded in book 487 of deeds, at page 172?

A. The abstract showed such a trust deed.

Q. Did you have a release before you which had not been filed for record for that trust deed? Did you have a release before you of that trust-deed which had not filed, for record, which was to be filed?

A. I think so.

Q. Who was this release made by?

A. My impression is it was drawn by Jackson.

By Mr. SKINNER:

Q. To whom?

A. Well, I cannot tell now to whom it ran; whether it ran to the original grantor in the trust deed or to some one of the subsequent owners of the property.

230 Q. Your notes show that it was to be filed, and had not been filed for record; what do your notes show in regard to its having been recorded?

A. At the time I made the examination, I made a memorandum opposite my note of this trust-deed, that the release was to be filed.

Mr. SKINNER:

Q. What release?

A. The release of that trust-deed.

By same:

Q. What trust-deed?

A. That trust-deed dated October 1, 1868, which has heretofore been described as recorded in book 487, page 172.

Q. The date of this examination was what?

A. On the first of August, 1872.

Q. First of August, 1872?

A. Yes.

Q. How far down was the abstract brought?

A. June 29, 1872.

Q. Who was it made up that abstract?

A. The last continuation was made by Chase Bros. and Co. and Jones and Sellers.

Q. State what period of time that abstract covered that you examined for the Swifts at the request of their agent, Mr. Fields?

A. I can only tell from my memoranda.

Q. Read from your memoranda what you wrote in regard to that at that time.

(Objected to as being incompetent.)

A. My first memoranda relating to it?

231 Q. State, if you can, after refreshing your memory from your notes, what abstract it was you examined, and what period of time it covered.

A. I have no recollection of it, whatever. I can only tell by reading what my notes say.

Q. Do you know from reading your notes that what you wrote there is correct?

A. My notes are made correctly.

Q. Then you remember examining the title?

A. I remember; yes, sir.

Q. State your best recollection of what occurred, after refreshing your memory from your notes.

A. Well, I have little or no recollection whatever, as to the abstracts, or when or by whom they were made.

Q. State what your notes say.

A. I always make a memorandum on my notes as to the dates of the abstract.

Q. State what your notes shew there.

(Objected to, as being incompetent.)

A. My notes say, Jones and Sellers, and Chase Bros. & Co., May 1, 1872, in connexion with examination (as to other property) by Rees, Chase and Co., April 11, 1860, bringing examination as to lots 15 and 16 down to May 20, 1847.

Q. Well, do they show also at the conclusion, Chase Bros. & Co. and Jones and Sellers, down to June 29, 1872?

A. The last memorandum I have relating to that matter is

232 Chase Bros. & Co., Jones and Sellers, June 29, 1872, from May 20, 1847.

Q. Was it your habit, or did you have any universal custom, about making these entries when you examine titles?

A. I always do.

Q. Can you swear from the course of business, your usual manner of doing business, that the entries you made there are correct?

A. I have no doubt they are.

Q. You say Mr. Field acted as the agent of the Swifts and brought this abstract which you examined?

A. He negotiated the loan; yes, sir; C. R. Field.

Q. Was the practice in your office, was it your practice after an entry like this, to have it continued down so as to show the trust deed given for the loan?

(Objected to.)

Q. What is your practice?

A. Sometimes I did and sometimes I didn't; I had no practice.

Q. Do you remember whether you caused a deed, this release deed to be recorded? This Runnion release. There were two releases, one from Runnion to Dyer and one from Jackson to Dyer—Runnion to Jackson, I think it is.

A. There is a trust deed from Obadiah Jackson to Norman C. Perkins dated June 1st, 1872, and recorded August 3, 1872, a release deed from——

233 Mr. SKINNER. I object to the interrogatory.

Q. Was there any objection made to this title, and, if so, when? State what it was.

A. I think this trust deed from Williams to Jackson was not matured at the time. I think the note was not; I think the note was not matured at the time. I saw Jackson and asked him about that, and also saw him in reference to the power of attorney from Mrs. Moody to Runnion, and also in reference to a judgment that the abstract showed in the case of Kretzinger vs. Jackson and Walker; I think that is it.

Q. Did you want a quitclaim deed from Mrs. Moody?

A. Yes, sir; he made an affidavit as to the contents of the power of attorney which was burned by the fire.

Q. We don't call for anything that he said or did.

A. And I drew a quitclaim deed to be executed by Mrs. Moody to cover that defect, which was afterwards put on record by Mr. Field, as he informed me.

Q. Mr. Field had that quitclaim deed recorded, did he?

A. Yes, sir; I find on looking over my books a note saying that he filed it for record.

Q. Do you know whether the deed to yourself was recorded?

(Objected to as being incompetent.)

234 Made by Jackson to yourself; the deed of trust dated June first, 1872.

A. I know that it was recorded very soon after I made this examination.

Q. Could you state within a few weeks what time it was?

A. Yes, sir; it was within a few days of that time.

Q. You say that the examination was made the 29th of June?

A. No, sir.

Q. The first of August. It was made a few days after the first of August, 1872?

A. It was made a few days afterwards.

Q. You concluded that examination on the first of August, did you, according to your minutes?

A. The minutes show that I commenced it on that day. It could not have been concluded until the next day or the day after.

Q. Did you cause that deed of trust to be recorded?

A. Yes, sir.

Q. Did you take—did you take any other papers with you to the recorder's office at that time?

A. That I couldn't say. I don't know who recorded the papers relating to the property at that time.

Q. And you cannot remember whether you took them to the recorder's office or not on the 3d of August?

235 A. I do not know.

Q. You knew that it had not been filed for record when you made that examination on the first of August?

A. At the time I first went through the abstract I did not see that it had been recorded.

Q. You made a minute when you examined this, did you, August 1st, and at that time you made memorandum that the release was to be filed?

A. Yes, sir.

Q. Do you know who gave you the release?

A. I think Jackson showed it to me; that is my impression about it.

Q. Did he also show you the release from Runnion to himself?

A. I have no recollection whatever. Very likely he did, but I don't remember.

Q. Did you advance the money to record the papers? Your cash-book would show that.

A. That I cannot tell. The money came through Mr. Field and I very likely made no entry on the books. The recording I think would have been paid by Jackson, not me.

Q. Do you know who recorded the trust deed to yourself from Jackson and the release deed from Runnion to Jackson, and the release deed from Jackson to Dyer?

236 A. The trust deed to me went from my office to the recorder's office. I don't think I took it myself. I cannot recollect now who did take it. I know that it went from my office. I do not know who recorded the other papers. That trust deed to me was recorded and went from my office to the recorder's office.

Q. State whether this trust deed referred to by you—will you state whether the deed now exhibited to you, made by Jackson and wife to Norman C. Perkins for the use of Joseph and Edwin Swift to secure bonds of $50,000 marked by the recorder general No. 47465, and filed for record on the 3rd of August, 1872, and recorded in book 117 of deeds at page 53, is the trust deed which you took on that occasion?

A. Yes, sir; it is the one.

Q. When was that deed acknowledged?

A. The certificate is dated the 29th of June, 1872.

Q. That was recorded August 3, 1872, was it not?

A. Yes, sir.

Q. When was that deed accepted by you from Jackson? After you passed upon the title or before?

A. I presume it came to my hand——

Q. After you accepted the title?

A. On the date it was recorded, probably.

237 Q. That deed was recorded on the 29th of June. I mean it was acknowledged on the 29th of June, but it was not delivered to you until after you made the examination. It could not have been delivered until you accepted the title?

A. It was not delivered in the sense that it was to be recorded and used.

Q. Until after the examination on the first of August, 1872?

A. No, sir.

Q. Was that deed prepared in your office?

A. Yes, sir.

Q. You stated that the deed from Dyer to Jackson, recorded June 18, 1872, appeared on the abstract according to your notes of the abstract?

A. Such a deed appeared.

Q. Recorded June 18, 1872?

A. The deed dated June 1, 1872, appears—my notes do not show time of record.

Q. But the deed does appear on your notes as having appeared in the abstract?

A. Yes, sir.

Q. Now, will you read the entries on your minute book and the reporter may take them down just as they appear—the entire notes taken by you on the occasion of your examination of the title on the first of August, 1872.

Mr. SKINNER. Mr. Stenographer, note an objection as being incompetent.

238 A. Well, I can hardly read them so that anybody can understand them. I cannot read them so as to give any idea of what they indicate or mean.

By Mr. BURGESS:

Q. Will you make a copy of the entry on your book and attach it to your deposition?

A. I don't think I will. I will let you have the book to copy it as long as you want it.

Q. State whether that is the release from Obadiah Jackson. First state whether the release now shown you, recorded in the recorder's office, in book 5 of records, at page 97, general number 47467, marked Exhibit X, for identification, is the same deed of trust, same release deed which was exhibited to you on the examination of that title.

A. I think it is.

Q. Did you have it acknowledged, or was it acknowledged when it was brought to you?

A. I did not have it done.

Q. Do you know from whose possession it came into your hands, or by whom exhibited to you?

A. I think from Jackson.

Q. Do you know whether that acknowledgment was on it when it was exhibited to you?

A. Well, I have no recollection about it.

Q. State your best recollection—your best impression.

(Objected to. The witness has just testified that he has no recollection.)

239 A. My impression is that Jackson showed me the release which he had prepared. I think this is the one.

Q. Do you remember whether that release went on with the deed of trust to be recorded—the deed of trust to you?

A. No; I do not. I have no recollection about it at all.

By Mr. BURGESS:

Q. Do you see any memorandum made on it by yourself?

A. I wrote the names on the back of it.

By the same:

Q. You wrote those names?

A. Yes, sir.

By the same:

Q. That is in your handwriting?

A. Yes, sir; those two names endorsed on the back of it—Obadiah Jackson, C. V. Dyer.

By the same:

Q. You recollect when you put those names there?

A. No; I have no recollection. I see they are in my handwriting.

Q. Look at the—look at the paper and see if there is the name of the person by whom the blank was printed?

A. It says on the bottom of the filing "James Cockcroft and Co., 499 Wabash Ave., Chicago."

Q. Do you recollect whether that was the blank which you used in your office or not?

A. I do not think it is my blank. That release was not used in my office at all.

Cross-examination by O. SKINNER:

240 Q. Mr. Perkins, who first approached you to employ you to examine the abstract about which you have been testifying?

A. I think Mr. Field.

Q. When was that?

A. I cannot tell when the matter was first spoken of. He sent the abstract to me about the first of August, 1872, probably a day or two before that, but the business, the matter of the loan, may have been spoken of before. I don't remember of it now.

Q. Did he take the abstract to you, or some one for him?

A. I don't remember.

Q. Were there any other papers with the abstract?

A. I think not.

Q. Did you call upon Mr. Field for any other papers except the abstract?

A. I made objections either to Mr. Field, or perhaps to Mr. Jackson. He may have sent Jackson to me. I presume I first mentioned them to Mr. Field.

Q. Made what objections?

A. I made a question as to the trust-deed from Williams to Jackson of which I have spoken.

Q. You have no doubt that you made those objections to Mr. Field, have you, instead of to Mr. Jackson?

A. No, sir.

Q. You naturally would go to him for any other papers, wouldn't you?

241 A. Yes, sir. I should naturally indicate it to Mr. Field in the first instance.

Q. Well, how do you know to whom you delivered the abstract, when you closed the examination?

A. I do not know.

Q. Have you any knowledge of it?

A. No, sir.

Q. Have you any recollection of it?

A. No, sir; I don't remember.

Q. Have you any recollection of what you have testified to, except as your memory has been refreshed by reading your notes?

A. I remember about examining the title and by looking over my memorandum that I made at the time I remember some circumstances in regard to it.

Q. But your knowledge is based on your examination of the minutes you made, as you have testified to already?

A. To this extent: when Judge Higgins came to see me at my office and enquired about this matter, about this title last spring I had no recollection about it. It had passed out of my recollection. Then I looked up this memorandum book and showed it to him at the time, and by looking at this and some notes that Mr. Field wrote in reference to sending the abstract and filing the papers, I came to remember some things.

Q. Now, have you any recollection of having any conversation with Mr. Jackson about this abstract, or about any of the papers?

242 A. I think Mr. Jackson came to my office once or more, I presume, in response to Mr. Field's request, though I do not know anything in reference to that matter.

Q. Do you know he did?

A. I have no doubt he did.

Q Do you remember it?

A. Yes, sir; he came to my office.

Q. Have you any knowledge if it was recorded at the time the trust-deed from Jackson to you was recorded?

A. I have no recollection as to that independent of what the record shows.

Q. Counsel shows you the paper endorsed "released deed," from Obadiah Jackson to C. V. Dyer, having on the inside the words, "Exhibit X for identification," and asks, are you positive that this was brought you by Mr. Jackson?

A. I think it was.

Q. That is the release deed, of the deed of trust made by George N. Williams, purporting to have been made by him to Obadiah Jackson, is it not?

A. Yes.

Q. Has the counsel now examining you ever called on you at your office in regard to this matter?

A. Yes, sir.

Q. Do you remember some time in June last that the same counsel called upon you and asked you if, when you examined the ab-

243 stract of title to this property a release deed from Jackson to Dyer was ever exhibited to you, and that you told him there never was?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. You don't remember having told the counsel that several times in your room?

A. No, sir; I did not tell the counsel that. I think the counsel is mistaken.

Q. Your memory is a little treacherous. Don't you remember at the same time you were telling the counsel that you told Mr. Field that there should be a release deed from Williams to Jackson put upon record, but that you never saw the deed—that Mr. Field had the release deed filed and recorded?

A. Not exactly in that way. I have no doubt, as I said a few minutes ago, that I made the objection in the first instance to him. That would be accordance with the usual way of doing business. I don't know who recorded it. That I told you. I don't know now.

Q. You don't remember, then, that you told me that you never saw any such release?

A. No, sir; I could not have put it in that way. It is possible that

I might have told you that I didn't remember seeing such a release at that time. That would have been possible.

By Judge HIGGINS:

244 Q. On looking on the release with your endorsement, you are sure you did see it?

A. I thought over that matter more since that, and I think Mr. Jackson bought such a release and I endorsed it and put those names on the back of it.

Q. Was it acknowledged when it was exhibited to you?

A. That I took no notice of.

By Mr. SKINNER:

Q. Well, as a lawyer, wouldn't you, in sending this deed to the recorder's office to have it recorded, wouldn't you see that it was acknowledged?

A. Yes, sir; naturally.

Q. Well, what is your remembrance of it? Was it acknowledged when it was exhibited to you?

A. Well, I have no recollection of it.

Q. Have you any recollection of having any conversation with anybody about that being acknowledged?

A. I think some one; perhaps Judge Higgins; or it may be yourself.

Q. No. At the time you passed upon the title.

A. No; I don't remember.

By Mr. BURGESS:

Q. Do you know when you put that endorsement on it that you say you did?

A. No, sir. I haven't seen it since it was recorded until to-day.

Q. You don't know whether you put it on before or after it came
245 from the recorder's office?

A. I never saw it until to-day since it went in to the recorder's office. I haven't seen it since until now.

By Mr. HIGGINS:

Q. The notes which you made in your note-book on the first of August stated that the release deed should be recorded, didn't they?

Mr. SKINNER. Objected to. You have his notes there, and you are going to attach them to his deposition.

By Mr. HIGGINS:

Opposite to the trust deed to Obadiah Jackson, recorded in book 487 of deeds, at page 172, what do the words "Rel. to be filed" mean?

A. Well, that is in my memorandum, opposite No. 45 of the last continuation of the abstract. It showed the trust deed from Jackson, the trust deed from Williams to Jackson, recorded in book 487 of deeds, page 172, opposite which I have the words "Rel. to be filed." "To be" was afterwards erased. That indicates that at the time I made the examination I wished to remember that there was a release to be made.

Q. Striking it out would indicate that it was filed afterwards?

A. Yes, sir.

Q. Now, what did—you have stated that before the entry was
246 made on the first day of August—was it on or after the first of August?

A. Yes, sir.

Q. It was either on or after the first it was made, was it?

A. Yes, sir.

Further taking of testimony postponed until 2 o'clock p. m., August 28, 1877.

Deposition of LORENZO C. HOMMES, taken on behalf of the complainant, before Henry Waller, examiner, at Chicago, on August 28, 1877.

Direct examination by Mr. BURGESS:

Q. What is your name, age, residence, and occupation?

A. My name is Lorenzo C. Hommes. I reside at No. 238 Third ave., Chicago. Occupation, superintendent of the record department at the recorder's office.

Q. How long have you been employed in the recorder's office in this county?

A. About nine years, I guess.

Q. Were you there while Norman T. Gassette acted as recorder of this county?

A. Yes, sir.

Q. What were you employed by him to do?

A. Superintending. Chiefly giving general information in the office.

Q. What is the practice in the office in numbering papers when
247 they are received to be recorded in the recorder's office? Are they numbered in consecutive order, if you know?

A. Yes, sir; they are entered in the entry-book in consecutive order.

Q. What does the No. 47467 indicate upon the paper which I now show you, being a release purporting to be executed by Obadiah Jackson, and put in evidence here as Exhibit No. X in the cause?

A. That shows that there were 47467 deeds filed at that time.

Q. That being the 47467th deed?

A. Yes, sir.

Q. Whose handwriting is the entry in the recorder's certificate, signed Norman T. Gassette, on the back of that paper before you?

A. It is Mr. Bingham's, who is the entry clerk. He put the numbers on and the date of the filing, and this one was put down by the folio writer. The signing itself was not done by Bingham; it was done by the deputy. He was then the chief clerk. His name is Charley Martin.

Q. He signed the name Norman T. Gassette?

A. Yes, sir.

Q. When was that done?

A. That was done when the instrument was all finished.

Q. And had been compared and was ready for delivery?

A. Yes, sir.

248 Q. Have you examined the entry-book that was kept in the recorder's office during the months of June and July and August, 1872?

A. I think I have looked them over yesterday.

Q. Have you examined the entries that are made on that book on the third of July, 1872?

A. Yes, sir.

Q. The whole of them?

A. I examined the whole date.

Q. You examined the whole date?

A. Yes, sir; the whole of the 3rd of July.

Q. Did you find any of the entries that were made on the 3rd of July made in your handwriting?

A. Yes, sir; some of them are.

Q. Did you find in the entry-book any entries made on that day touching this paper which I have shown you?

A. No, sir.

Q. Did you have the paper there at the time you made that examination?

A. I did.

Q. Did you find any entry touching it on any other day; and if so, what day was it that you found the entry?

A. On the third of August, 1872.

Q. In connection with what other papers?

A. I think there was a deed from to Perkins, as trustee, and there was one to Runnion, from Runnion to somebody else. The name I don't know.

Q. To Jackson?

249 A. Yes, sir; I think so. I remember those names were there.

Q. Now, what were the numbers—the highest and the lowest numbers on the third day of July, 1872? Do you recollect them?

A. No; I forget the numbers now.

Q. Was the No. 47467 included in those numbers?

A. It was entered on the third day of August instead of being here marked the third day of July. That was an error of Mr. Bingham.

Q. What I asked you was whether that number was among the numbers of the entries on the 3rd of July, 1872?

A. No, sir.

Q. What were the numbers entered on that day, if you know.

A. Well, lower numbers, varying, I think, from 42000.

Mr. BURGESS. If the witness is needed again we will call him again.

LORENZO C. HOMMES.

Deposition of NORMAN C. PERKINS, recalled for further cross-examination by Mr. O. Skinner on August 28, 1877.

Q. Mr. Perkins, calling your attention to the release deed, respecting which you have been testifying, and which is an exhibit in the
250 cause as Exhibit X, and which you say you think Mr. Obadiah Jackson exhibited to you at the time you passed upon the title to the land here in controversy, what, if anything, did Mr. Jackson say about this paper and the other papers when he showed this to you?

(Objected to by Mr. Burgess.)

A. The sight of this release deed, with the date of it, recalls to my mind the fact that I inquired of him as to what he knew concerning the payment of the Williams trust deed and what had become of the notes or note; and he replied that the Williams trust deed, or notes secured by it, was paid and taken up on the date that this release bears date, the second of October, 1871, but that the papers had all been destroyed in the fire, and for that reason he put this date in as it stands, October 2, 1871.

Redirect examination by Mr. BURGESS:

Q. Did you ask him why that trust deed—the release deed—had not been recorded before that time?

A. I did not. I do not think I did. The date was just a week or so before the fire.

Q. You noticed that it was before the note was due?

A. Yes, sir.

251 Q. Did you ask him who was the holder of that note at the time it was paid?

A. I do not think I did.

Q. Did you have before you at that time the deed marked "Exhibit 5, C. V. D.," to which your attention was called on your former examination the other day?

A. I think not.

Q. Was your attention at any time called to the fact that about that time—called to the statement that appeared in the body of that deed after the words "warrant and forever defend"—that is, in writing down to the words, "and the party of the first part" in print?

A. No, sir.

Q. Did you at that time know that such a paper as that was in existance?

A. Only as shown by the abstract.

Q. Did the abstract show that?

A. It showed the deed.

Q. Did it show anything more than the deed?

A. No, sir; not that I can now recollect.

Q. If it had showed that an assumption of payment was there, would you have believed what he said about its being paid?

A. At that time I would have taken his statement for anything, just as I would take yours now.

Q. Whether you were aware of it or not?

252 A. I should have taken his statement at that time as being perfectly true.

Q. In whose handwriting is the filling up of that deed?

A. I don't know.

Q. Is it not that of Obadiah Jackson?

Q. I am not sufficiently acquainted with his handwriting to identify it with any certainty.

Q. Didn't he tell you in the same conversation that you have alluded to that he had dated this release back to the first day of October, 1871, or words to that effect?

A. I don't understand exactly what you mean by dating it back. He told me that he dated it the second of October, 1871, because on that day the note—the Williams note—had been paid and taken up.

Q. He didn't tell you he had executed the release deed?

A. I don't think he said anything about that.

Q. He merely said he dated it back to that time?

A. That was the reason he gave me for putting that date in there.

Q. Didn't you understand from him that this release was executed at that time or about that time, and that he had brought it to you?

A. My impression is that when I first saw the release it was signed but not acknowledged.

253 Q. Didn't you understand from him at the time—from what occurred at that time—that that was dated back to the first day of October, 1871?

A. Well, I understood, as I have stated—I understood at the time that that date was put into the release for the reason that that was the date at which the payment was made.

Q. And not the date of the execution of the paper itself?

A. I don't think anything was said at all on that point.

Q. Your recollection is that the paper was acknowledged after it was brought to you?

A. My impression is that when he first brought it to me it was signed but not acknowledged.

By Mr. SKINNER:

Q. Was this deed from Dyer to Jackson, about which Mr. Burgess has been interrogating you, shown in full in the abstract?

A. Oh, no.

Q. Just in the usual way?

A. Yes, sir. There was no deed shown in full.

By Mr. BURGESS:

Q. What do you mean by the usual way on the abstract?

A. Well, there was nothing on the abstract by which I can now remember it as distinguished from the other deeds in this memorandum of my examination.

254 Q. There was then nothing on the abstract to call your attention to the fact that there was an assumption on the part of Mr. Jackson to pay this debt?

A. That I could not state. There is nothing on my memorandum here to indicate it.

Q. From your usual way of doing business, wouldn't you have noted it on your memorandum which you have made and which you have now before you?

A. Well, I might or might not.

Q. So you cannot say whether there was anything on your abstract to inform you of that fact?

A. I cannot tell. I stated the other day I could not from my recollection, without the aid of my memorandum, give this information.

Q. What is the paper you now hold in your hand?

A. A photographic copy of the notes of examination of title which I made about the first and second days of August, 1872.

Q. Put that in as a part of your deposition, marked Exhibit No. 7.

(The photographic copy goes in evidence subject to the same objection that was made to the testimony of the witness by defendant's counsel, to wit, that the witness's notes are incompetent.)

NORMAN C. PERKINS.

255 EXHIBIT NO. 7.

256 Deposition of BERNARD CALLAGHAN, taken on behalf of the complainant before Henry Waller, examiner, at Chicago, on August 29, 1877.

Testimony of Bernard Callaghan.

Direct examination by Mr. BURGESS:

Q. What is your name?

A. Bernard Callaghan.

Q. Where do you reside, sir?

A. At 1396 Indiana ave., Chicago.

Q. What business are you engaged in now?

A. I am engaged in the law publishing and bookselling business.

Q. How long have you been in business in Chicago?

A. Since the spring of 1864.

Q. Just previous to the fire, or during the year 1871, with whom were you in business and what kind of business?

A. With James Cockcroft; in the same business that we are now carrying on.

Q. How long did you remain in business with Mr. Cockcroft?

A. I think something over three years prior to the fire.

Q. How long after the fire did you remain in business with him?

A. Up until the third of January following.

Q. 1872?

A. Well, perhaps I ought to modify that a little. I announced a dissolution on the 26th of December, in 1871, but it was on the re-
257 ceipt of a telegram from New York that he accepted a proposition that I had made to him. Finally the final separation did not take place until the 3d of January following.

Q. Well, where were you and he in business at that time, and under what name?

A. Callaghan and Cockcroft; we were then on 525 Wabash ave.

Q. How long had you been at that place in reference to the fire of October, 1871?

A. Well, I think a month or six weeks after the fire; perhaps a month. I remained there for something over a year, I think.

Q. When Cockcroft dissolved with you in business, where did he go and under what firm name?

A. James Cockcroft and Co.; into the law bookselling business, a few doors north of me, on Wabash avenue.

Q. How long did he remain there?

A. I think he remained there a little over a year.

Q. To whom did he sell out?

A. He sold his stock to us and quit the business here and went to New York.

Q. In that stock were there any blanks?

A. There were.

Q. Will you look at the paper now shown to you, marked Exhibit X, in this cause, and state whether you recognise that as one of the blanks you purchased from James Cockcroft and Co., a similar blank to that?

258 A. This is the same blank. I could not state that it was one of the same he sold to us. It is a similar blank to some that we purchased of him.

Q. Have you any of those blanks yet?

A. I think we have, sir.

Q. Can you produce one?

A. I haven't one with me. I think we have them in the store.

Q. Is that one?

A. That, I think, is one of them, sir.

Q. I put that in as an exhibit marked No. 8. Looking again at the paper marked Exhibit X, do you see anything upon that paper which indicates it as having been published by James Cockcroft and Co.?

A. Yes, sir; I do.

Q. What is it?

A. The name "James Cockcroft and Co." and his address, 499 Wabash ave.

Q. Were James Cockcroft and Company in business in that place, 499 Wabash ave., on the first of October, 1871?

(Objected to, unless the witness testifies that he knows where they were.)

Q. Who composed the firm of James Cockcroft and Company?

A. I don't think, sir, there was any member but Cockcroft. I think

A. With James Cockcroft; in the same business that we are now carrying on.

Q. How long did you remain in business with Mr. Cockcroft?

A. I think something over three years prior to the fire.

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257 ceipt of a telegram from New York that he accepted a proposition that I had made to him. Finally the final separation did not take place until the 3d of January following.

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(Objected to, unless the witness testifies that he knows where they were.)

Q. Who composed the firm of James Cockcroft and Company?

A. I don't think, sir, there was any member but Cockcroft. I think

Mr. Burgess appearing for the complainant, and Mr. Skinner for the defendants, the following testimony was taken:

The complainant offers in evidence from an examination of title of lots 15 and 16 in block 111 in school section addition to Chicago, Cook County, Illinois, made in the usual course of business, as evidence of the contents of certain papers filed in the recorder's office in said county, namely:

Charles C. Waite and Julia B., his wife, to George N. Williams. Stamp, 46 dollars. Document No. 187222. Warranty deed, dated October first, 1868, and recorded October 24, 1868, in book 487, page 222; consideration, $46,000.00; conveys lots 15 and 16 in block 111 in school section addition to Chicago.

George N. Williams, a bachelor, to Mrs. Mary P. Moody, the
264 wife of John K. Moody. Stamp, $60.00. Document No. 187273. Warranty deed, dated October 5, 1868, and recorded October 24, 1868, in book 487, page 224; consideration, $60,000.00; conveys the premises last above described, subject to a certain trust deed on said premises, executed by said party of the first part to Obadiah Jackson, as trustee, October first, 1868, to secure the payment of $36,000.00, according to the tenor of two promissory notes of that date, payable to Charles C. Waite, or order, one of said notes for $6,000.00, payable one year after date, and one of said notes for $30,000.00, payable 4 years after date, with interest at the rate of eight per cent. per annum, payable semi-annually; which notes the party of the second part hereby assumes and agrees to pay as part of the consideration money for this purchase. Homestead rights waived.

Mary P. Moody, widow of John K. Moody, deceased, by James B. Runnion, her attorney in fact, to Charles V. Dyer. Stamp, $45. Document No. 98414. Warranty deed, dated May 17, 1871, and recorded May 25, 1871, in book 663, page 630; consideration, $45,000.00; conveys lots 15 and 16 in block 111 in school section to Chicago, subject
265 to a trust deed given by George N. Williams to Obadiah Jackson, dated October first, 1868, and recorded in book 487, page 172, to secure a certain note on which there is due $30,000.00, payable October first, 1872, with interest at 8 per cent. per annum; which amount, with said interest from this date, the party of the second part hereby assumes as part of the consideration hereof; also subject to taxes and assessments for the year 1871.

Mrs. Mary P. Moody, widow of John K. Moody, to Charles V. Dyer, document No. 49497, deed dated June 6, 1872, and recorded August 13, 1872, in book 112, page 374, consideration $1.00, remises, releases, sells, conveys, and quitclaims all right, title, and interest in and to lots 15 and 16 in block 111 in school section addition to Chicago, Cook County, Illinois.

Certificate of acknowledgment dated August 9, 1872.

Also, Mary P. Moody to James B. Runyan, power of attorney, dated May 8, 1871, and recorded May 10, 1871, in book 635, page 469, relating to lots 15 and 16 in block 111 in school section addition to Chicago.

266 The defendants consent that the foregoing may be read in evidence, it being understood that both parties have made search and enquiry of C. V. Dyer, Obadiah Jackson, and Mary P. Moody, for the deeds last above described and each and every of them, and that neither of the parties have been able to find the same, or ascertain their whereabouts, and the defendants reserve the privilege of introducing at any time before the hearing of the cause the abstract of title examined

by Norman C. Perkins as testified to by him in his deposition herein, and of calling said Perkins to identify said abstract.

It is stipulated that no exception shall be taken to the deposition of Charles V. Dyer, for the reason that it was taken by the master in chancery after the petition for the transfer of the cause from the State court to the circuit court of the United States had been filed. The same may be read in evidence as though taken under the present reference.

Taking of testimony is again postponed until Monday, September 3d, 1877.

SEPT. 3RD, 1877.

The parties by their solicitors, as heretofore stated and agreed to, close the testimony at this point.

267 Sixth. A transcript or statement from an abstract of the examination of the title to the said lands and premises as contained in the proofs certified by Henry Waller to this court as set out on page 263 of this record.

The complainant also read in evidence the letters of administration granted to Janet Smith on estate of David Smith, by Cook County court, as follows:

STATE OF ILLINOIS,
Cook County, ss:

County court of Cook County.

The people of the State of Illinois to all to whom these presents shall come, greeting:

Know ye that whereas David Smith, of the county of Cook and State of Illinois, died intestate, as it is said, on or about the sixth day of February, A. D. 1875, leaving at the time of his decease personal property in this State, which may be lost, destroyed, or diminished in value if speedy care be not taken of the same: To the end, therefore, that said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Janet Smith, of the county of Cook and State of Illinois, administratrix of
268 all and singular the goods and chattels, rights and credits, which were of the said David Smith at the time of his decease, with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now are or hereafter may be required of her by law.

Witness Hermann Leib, clerk of the county court of Cook County, and the seal of said court, at Chicago, in said county, this 19th day of March, A. D. 1875.

[SEAL.] HERMANN LIEB,
Clerk.

STATE OF ILLINOIS,
Cook County, ss:

I, Hermann Lieb, clerk of the county court of Cook County, in the State aforesaid, do hereby certify that the within is a true and correct copy of letters of administration issued to Janet Smith, on the nineteenth day of March, A. D. 1875, as it appears from the original on file in my office and now in force.

In witness whereof I have hereunto set my hand and the seal

269 of this county court at Chicago, in said county, this twenty-second day of March, A. D. 1875.

[SEAL.] HERMANN LIEB, *Clerk.*

(Endorsed:) Filed March 19th, A. D. 1875. H. Lieb, clerk.

And also the various stipulations made to the complainant by the defendants as contained in the record from the State court and in the proofs certified by Henry Waller, examiner, to this court.

The defendants also read in evidence the stipulation filed in the cause the 2d day of October, A. D. 1877, as to the date of insolvency of Obadiah Jackson, as follows, to wit:

U. S. circuit court.

JANET SMITH, ADMINISTRATRIX,
v.
NORMAN C. PERKINS ET AL.

It is stipulated by both of the parties herein that Obadiah Jackson, one of the defendants herein, became publicly insolvent in November, A. D. 1876.

Oct. 2d, '77.

GOUDY, CHANDLER AND SKINNER,
For the Defendants.
W. T. BURGESS, *Compl't's Sol'r.*

270 (Endorsed:) Filed Oct. 2, 1877. Wm. H. Bradley, clerk.

The foregoing was all the testimony offered by both parties, and by either of them, upon the hearing of the cause, and the said defendants, Edwin and Joseph Swift and Elizabeth and Ellen Carroll, tender this certificate of evidence, and pray that the same be signed and sealed by the judge of this court; which is done accordingly, this 6th day of October, A. D. 1877.

THOMAS DRUMMOND.

(Endorsed:) Filed October 6, 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the ninth day of November, A. D. 1877, said defendants, Edwin Swift and Joseph Swift, Ellen Carroll and Elizabeth Carroll, by their solicitors, filed in said clerk's office their bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

JANET SMITH, ADMINISTRATRIX OF THE ESTATE of David Smith, deceased,
vs.
271 OBADIAH JACKSON, GEORGE N. WILLIAMS, Norman C. Perkins, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, David Vernon; The Mutual Benefit Life Insurance Company of Newark, New Jersey; Eli F. Hollister, Selden H. Gorham; Nathan H. Walworth, receiver of the City National Bank; Franklin K. Orris, J. L. Orris, Isaac Meyer, Mayer Palinski, Aaron Barrett, John J. Morgan, and Bernard Guisburg. } In chancery.

Know all men by these presents that we, Edwin Swift and Joseph Swift, of the State of Pennsylvania, and Ellen Carroll and Elizabeth Carroll and William C. Gondy, George Chandler and Orrin Skinner, of Chicago, in the State of Illinois, are held and firmly bound unto Janet Smith, administratrix of the estate of David Smith, deceased, in the sum of twelve thousand dollars, to be paid to the said Janet Smith, her successors or as-
272 signs, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this thirteenth day of October, A. D. 1877.

Whereas the above named Edwin Swift and Joseph Swift and Elizabeth Carroll and Ellen Carroll have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above named Edwin Swift, Joseph Swift, Ellen Carroll, and Elizabeth Carroll shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

EDWIN SWIFT. [SEAL.]
JOSEPH SWIFT. [SEAL.]
ELIZABETH CARROLL. [SEAL.]
ELLEN CARROLL. [SEAL.]
W. C. GONDY. [SEAL.]
GEORGE CHANDLER. [SEAL.]
ORRIN SKINNER. [SEAL.]

(Endorsed:)
Approved.

THOMAS DRUMMOND.

Filed November 9, 1877.

WM. H. BRADLEY,
Clerk.

273 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United

States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Janet Smith, administratrix, &c., is the complainant, and Obadiah Jackson et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this ninth day of November, A. D. 1877, and of our Independence the one hundred and second year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

274 *Opinion, Oct.*, 1877.

U. S. circuit court, N. D. of Illinois. In chancery.

JANET SMITH, ADM'X OF DAVID SMITH,
v.
NORMAN C. PERKINS, JOSEPH AND EDWIN Swift, Ellen and Elizabeth Carroll, et al.

DRUMMOND, J.:

This is a bill filed by the complainant to enforce an alleged lien upon lots 15 and 16 in block 111, of the school section addition to Chicago, arising under a mortgage or deed of trust executed by George N. Williams, to Obadiah Jackson, on the 1st of October, 1868, to secure a note of $30,000, given by Williams to Charles C. Waite. The facts in the case, so far as they are material to a decision of this controversy, are substantially as follows:

Charles C. Waite, then a resident of the city of New York, was the owner of the property on the 1st of October, 1868, and Obadiah Jackson, one of the defendants, was then an attorney-at-law and resident of the city of Chicago, and the agent of Waite to dispose of it. Accordingly, Jackson having informed Waite that he had obtained a purchaser, transmitted to Waite, for his signature, a deed to George N. Williams, the alleged purchaser, and Waite duly executed on the 1st of October, 1868, a deed conveying the property to Williams. $10,000 were paid in cash, and two notes were given purporting to have been signed by Williams, one for $6,000, payable in one year, and the other for $30,000, payable in four years, which last note is the one in controversy, the $6,000 note having been paid; and to secure these two notes, Williams on the same day executed a deed of trust to Jackson. These notes were transmitted to Waite, and the note in controversy was by him assigned to his brother, S. M. Waite, then a resident of Vermont. The latter transmitted the note to Jackson for collection (the interest being payable semi-annually), having indorsed it in blank, thus clothing Jackson with authority over the note, as apparent owner and holder thereof.

On the 5th day of October, 1868, Williams, by a warranty deed, conveyed the land to Mary P. Moody, and on the 17th of May, 1871, Mrs. Moody conveyed the land to Dr. C. V. Dyer, by a deed of warranty. On the 1st of June, 1872, Dr. Dyer conveyed the land to Jackson, the trustee in the deed of 1st of October, 1868. All these conveyances, it is admitted, were made subject to the deed of trust already referred to, and stated that the respective grantees assumed, and agreed to pay the debt to secure which the deed of trust was given. And in the deed to Jackson, it is recited that the conveyance was made subject to the trust

deed, on which was due $30,000 and interest, the payment of which was assumed by Jackson. On the 18th of April, 1871, Jackson being indebted by note for $31,500 to the complainant's intestate, as collateral security for the same, transferred to him the $30,000 note secured by the deed of trust, having written over the blank indorsement of S. M. Waite, "Pay to Obadiah Jackson or order;" and thereupon Jackson indorsed the note in blank, by writing his own name thereon, he acting throughout as the absolute owner of the note.

Long after this arrangement was made by Jackson with Smith, Jackson pretended still to hold the $30,000 note, as agent and attorney of Waite, and occasionally made remittances to him to keep up the deception, he having no knowledge or even suspicion that the note had been pledged to Smith. He also continued to pay, till Oct., 1876, the interest on his note to him. Jackson, claiming to be the owner of the property, and being then considered responsible, though since insolvent, desired to raise money on it, and obtained a loan from the Messrs. Swift, of Philadelphia, alleging that the $30,000 note had been paid, and had been destroyed by the fire of 1871, although it had not yet become due and payable, and he produced to their agent and attorney, in August, 1872, when this negotiation took place, a deed of release from himself, as trustee, to Dr. C. V. Dyer, dated October 22d, 1871. This deed of release was not acknowledged or recorded until August, 1872, and was undoubtedly executed about that time, although purporting to bear date on the 2d of October, 1871. All the other deeds were executed at or about the time they bear date, and were within a short time of their date duly recorded. Jackson afterwards attempted to raise an additional sum of money, upon the security of this property, and gave a second mortgage or deed of trust, under which some of the defendants claim a lien.

The main question in the case is whether the $30,000 note is a valid lien upon the property under the deed of trust of the 1st of October, 1868, given by Williams to Jackson as against Messrs. Swift and others, defendants, claiming also liens upon the property. I think it is.

Some question has been made whether Williams, the grantee in the deed given by Waite, was a real person.

There is no satisfactory evidence in the record that he was a fictitious person; the testimony of Mr. Hoffman, who took the acknowledgment of the deed of trust, rather indicates that he was a real person, as he says he never took an acknowledgment unless he knew the grantor or he was introduced to him as the grantor by some person of his acquaintance. But I apprehend it would make no difference, even if Williams were a fictitious person. Waite, through whom the parties claim title, would be estopped from setting up any right to the property after what has taken place.

It is conceded that Jackson perpetrated a fraud in pretending to be the owner of the note, and in transferring it to Smith when, in fact, he simply held it as agent and attorney; this being so, the question is, who is to suffer by the fraud of Jackson, Smith or these other defendants who confessedly have advanced their money in good faith, relying upon the security which was given to them by Jackson? I think, under the facts, Smith must be considered a bona-fide holder of the $30,000 note for value, and therefore entitled to all the protection which the law gives to the holders of mercantile paper purchased for value before maturity. (Goodman v. Simonds, 20 Howard R., 343.) His lien was prior in point of time to that of the defendants. It was created by deed of trust which was on record and notice to all the world, and in addition to this all the

parties, from Williams to Jackson, who received a conveyance of the property took it with an express recital in each deed that it was subject to the debt secured by the deed of trust; and, further, the respective grantees agreed to become responsible for the debt, and pay it; in other words, they took the property subject to the encumbrance, and understanding that before they could obtain a good title to it the deed of trust was to be canceled and discharged by the payment of the debt.

Every person taking title to property is bound by the recitals of his title deeds, so therefore were all these grantees, and Jackson among the others. But it is said that admitting the Swifts had no right to take the statement of Jackson as to what had become of the $30,000 note, as the evidence shows that their counsel did, even before its maturity, still when the other defendants advanced money upon the property there was on record a release, purporting to bear date on the 2d of October, 1871, from Jackson to Dyer, and therefore that their lien at least was valid, however it might be with that of the Swifts.

As to the lien of the Swifts, objection was made at the time that there was no release of the deed of trust, and before the money was advanced a release was required, and accordingly it was produced and was acknowledged and recorded in August, 1872, but at the time this was produced, and at the time it was undoubtedly executed, Jackson had become clothed with the apparent title to the property—he had ceased to be a mere trustee, and had no claim to the immunities or privileges of a trustee; and neither was his conduct or actions entitled to the same legal presumptions in his favor as if he had been a mere trustee. Therefore, under the circumstances, parties advancing money on the faith of such title had no right to take the declarations of Jackson, or to assume that the release necessarily operated on the 2d of October, 1871, to clothe Dyer with the absolute title to the property discharged from the operation of the deed of trust. And as to the lien of the other defendants (and the same rule is applicable to all of the defendants), there was on the face of the title, upon the faith of which they advanced their money, enough to show that it was their duty to ascertain whether or not the debt, which the deed of trust had been given to secure, was paid.

Jackson took the title on the first day of June, 1872, subject to the $30,000 note, and agreed to pay it or to hold his title subject to it. There was, therefore, on the record and on the face of his title, at that time, something which contradicted the apparent effect of the deed of release purporting to be made on the second of October, 1871; and, therefore, the fact that the deed of release was not acknowledged and recorded till August, 1872, was of special significance, because if there had been a deed of release executed on the 2d of October, 1871, the property would have been entirely discharged from the operation of the deed of trust, and the recital in the deed of June 1, 1872, could not be true. So that there was on the face of the title and the record enough to rouse suspicion, and to show that it was the duty of any person who advanced money upon the title to ascertain whether or not the deed of trust of the 1st of October, 1868, had been in fact discharged. If, then, it be admitted that under ordinary circumstances full effect is to be given to the acts of a trustee as to property which he holds as such, still, in this case, Jackson, from the new relation which he assumed, having become clothed with the title, ceased to be a mere trustee, and the rule does not apply, and all parties were required to exercise legal diligence to see that the title was valid and the property released from the lien of the deed of trust by the payment of the debt. The plaintiff is, therefore,

entitled to a decree to enforce her lien against the property as the prior equity.

Mr. Higgins and Mr. Burgess for plaintiff.
Mr. Goudy and Mr. Skinner for defendants.
Correct.

T. D.

(Indorsed:) U. S. cir. c't, N. D. Ill's. In ch'y. Janet Smith, adm'x, vs. N. C. Perkins et al. Opinion.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the opinion of Hon. Thomas Drummond, judge of said circuit court, delivered in the cause wherein Janet Smith, administratrix of David Smith, deceased, is complainant, and Norman C. Perkins et al. are defendants, as appears from a publication of the same made in the Chicago Legal News of Saturday, November 3, A. D. 1877.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this ninth day of November, A. D. 1877.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Joseph Swift, Edwin Swift, Elizabeth Carroll, & Ellen Carroll, plaintiffs & appel's, v. Janet Smith, administratrix of David Smith, deceased, defendant & respondent. Appeal. Goudy & Skinner, solicitors for said plaintiffs & appellants.

(Indorsement on cover:) No. 351. Joseph Swift, Edwin Swift, Elizabeth Carroll, and Ellen Carroll, appellants, vs. Janet Smith, adm'x of David Smith, dec'd. N. Illinois C. C. U. S. Filed 15th November, 1877.

OFFICE SUPREME COURT U. S.
FILED
NOV 1 1880
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1880.

No. 351.

JOSEPH SWIFT, EDWIN SWIFT, ELIZABETH CARROLL and ELLEN CARROLL,
Appellants,

vs.

JANET SMITH, Administratrix of DAVID SMITH, deceased,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, in the Seventh Circuit.

BRIEF FOR APPELLANTS.

W. C. GOUDY,
Attorney for Appellants.

Beach, Barnard & Co, Legal Printers, 104 Randolph Street.

IN THE

SUPREME COURT OF UNITED STATES.

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Appellants,

vs.

JANET SMITH, Administratrix of DAVID SMITH, deceased,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, in the Seventh Circuit.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS SHOWN BY THE RECORD.

Charles C. Waite, of New York City, was the owner of lots 15 and 16 in block 111 school section addition to Chicago, and, Obadiah Jackson of Chicago, an attorney-at-law, had charge of the property as his agent. In the fall of 1868 Jackson wrote to Waite that he had a purchaser, and sent a deed to be executed, which was signed by Waite and returned to Jackson, who soon after sent to Waite $10,000 and two notes, one for $6,000 and the other for $30,000, purporting to be made by George N. Williams, and payable to the order of Waite. These notes were dated October 1, 1868. Waite did not know who was the grantee named in the deed. He trusted to Jackson the entire management of the matter. *Waite knew no such*

man as George N. Williams, and never made any enquiries about him. Nothing was paid on the $30,000 note to C. C. Waite, and within a month he sold and assigned it to his brother Silas M. Waite of Brattleboro, Vermont. (Record, pp. 2, 36 to 39.)

S. M. Waite within six months, and before the first semi-annual interest became due, as appears from the endorsement of the first payment of interest thereon, left the note for $30,000 with Jackson to collect, and at that time in Jackson's office at Chicago, endorsed the note in blank at Jackson's request, simply for the purpose of collection. The note was never sold by S. M. Waite to Jackson or any other person, and he supposed it was in the possession of Jackson for him, until it was exhibited when the deposition was taken. The words " Pay to Obadiah " Jackson or order " were written over the signature of S. M. Waite afterwards, and in Jackson's hand writing. Money was sent by Jackson to S. M. Waite as payments on the note, from time to time, the last in the latter part of 1874. Waite asked Jackson about the note in June, 1875, and he said it was burned in the fire of 1871. (Record, p. 40, 76.)

The note referred to reads as follows:

" $30,000. Chicago, October 1st, 1868.

" Four years after date, I, the subscriber, of Chicago, Coun-
" ty of Cook, State of Illinois, promise to pay to Charles C.
" Waite or order, thirty thousand dollars for value received, with
" interest at eight per cent. per annum, payable semi-annually,
" at the bank of A. C. and O. F. Badger, in Chicago.

" GEORGE N. WILLIAMS."

And a power of attorney was attached, to confess judgment, attested by Obadiah Jackson. (Record, pp. 2, 84.)

The deed of trust mentioned was dated October 1, 1868, purporting to be executed by George N. Williams, a bachelor, of Chicago, to Obadiah Jackson, to secure the above note, with the other for $6,000, with power to sell in case of default, by

publishing a notice for sixty days at the north door of the court house in Cook County, and upon the payment of the principal and interest to reconvey. The certificate of acknowledgment is dated Oct. 12, 1868, and signed by Francis A. Hoffman, notary public. (Record, pp. 2, 86, 88.)

Hoffman testified that he studied law in the office of McAllister, Jewett & Jackson, and was there some part of 1868. The original trust deed of Williams to Jackson was exhibited to him, and he thought the signature to the certificate of acknowledgment was his, but he was not certain. He had no recollection of ever seeing George N. Williams, and did not know such a man. He never took an acknowledgment as an officer without the person came before him. He was satisfied this man, said to be George N. Williams was introduced to him by Obadiah Jackson, which was the only personal acquaintance he had with him. (Record, pp. 61, 62.)

Thomas G. Parker, an agent of Charles C. Waite to collect the rents, at the time of the sale, knew Jackson as having the management of the sale, but he never knew a man by the name of George N. Williams. (Record, p. 70.)

John K. Moody, husband of Mrs. Moody who might have known of the transactions in which the name of Williams figures, was dead before Mrs. Moody conveyed to Dyer, and could not be called as a witness. (Record, p. 118.)

A warranty deed was made purporting to be executed by George N. Williams to Mary P. Moody, conveying the lots, in consideration of $60,000, subject to the trust deed to Jackson, to secure the notes for $6,000 and $30,000, which Moody agreed to pay as part of the consideration money. (Record, pp. 3, 118.)

The deed from Waite to Williams, trust deed from Williams to Jackson, and deed from Williams to Moody, were filed for record on the same day, Oct. 24, 1868. (Record, pp. 88, 118.) From this fact, it seems that they were all delivered, and the transactions completed on the same day.

On the 18th day of April, 1871, David Smith held a note made by Jackson and Rice, for $31,500, and then a new note for $31,500 was given by Jackson to Smith for the joint one, and Jackson then pledged the note for $30,000 to Smith, to secure the payment of the note for $31,500. The business was conducted by George Watson, a brother-in-law of Smith. The note for $30,000, with the trust deed, were delivered at the time by Jackson to Watson. (Record, pp. 46, 52.)

At the time of this transaction, and when the note for $30,000 was passed over, it had the following endorsements on the back, in the order now given:

(1.) " April 27, 1869. Twelve hundred dollars paid on this " note, being interest to April 1st, 1869.

" S. M. WAITE,
" By O. JACKSON.

(2.) " October 1st, 1869. Twelve hundred dollars paid on " this note, being interest to October 1st, 1869.

" S. M. WAITE,
" By O. JACKSON.

(3.) " Pay Silas M. Waite, or order.

" CHARLES C. WAITE.

(4.) " Pay Obadiah Jackson, or order.

" S. M. WAITE.

(5.) " April 1st, 1870. Twelve hundred dollars paid on " this note, being interest to April 1st, 1870.

" S. M. WAITE,
" By O. JACKSON.

(6.) " Oct. 1st, 1870. Twelve hundred dollars paid on this " note, being interest to Oct. 1st, 1870.

(7.) " May 17, 1871. Interest paid on this note to this date.

" S. M. WAITE,
" By O. JACKSON.

(8.) " Obadiah Jackson." (Record, pp. 57, 85.)

All of these endorsements were in the handwriting of Jackson, except the words, "Pay Silas M. Waite, or order, Charles C. Waite," and the signature, "S. M. Waite," over which was written, in Jackson's handwriting, "Pay Obadiah Jackson, or order." (Record, p. 101.) This was written over the signature, S. M. Waite. (Record, p. 40.) All of the endorsements were on the back of the note, when Jackson passed it over to Watson. (Record, pp. 47, 52, 53, 65.)

When Watson took the note for Smith, he examined the note, deed of trust, and abstract of title, and made no enquiry as to who the owner of the land then was. *He knew that Jackson was the trustee in the deed, but he did not enquire who was the owner of the note; he assumed that Jackson was, without asking the question, even of Jackson himself.* (Record, pp. 49, 50, 51.) The bill avers that the last payment of interest to May 17, 1871, (a month later than the pledge of the note) was entered when the note was transferred. (Record, p. 4.)

The deed of trust showed that Jackson was a trustee for the owner of the note, and the endorsements on the back of the note showed that Jackson had been receiving interest, as agent for S. M. Waite, the real owner of the note, from October 1, 1869, to May 17, 1871, a month after he undertook to pledge the note as security for his own debt. And, although dealing with a trustee and agent, without an inquiry, Watson received the note to secure the individual debt of Jackson, the trustee and agent. Watson made no inquiry as to the personal responsibility of George N. Williams, the apparent maker of the note. *He did not then know of such a man, and never did know such a man.* (Rec., p. 49.)

The next event, in the order of time, was the making of a deed by Mrs. Moody, joined by her husband, dated May 17, 1871, to Charles V. Dyer, in consideration of $45,000, subject to the trust deed to Jackson, to secure the note for $30,000, which the grantee assumed and agreed to pay, as a part of the consideration. (Rec., p. 118.)

A deed, dated June 1, 1872, was made by Dyer to Obadiah Jackson, the trustee, conveying the lots, subject to the trust deed purporting to be made by the supposed George N. Williams to Jackson, to secure the note for $30,000, and interest, and another trust deed, dated May 17, 1871, to James B. Runnion, and taxes and assessments, all of which were assumed by the grantee, which was recorded June 18, 1872. (Rec., pp. 88, 90.)

By this deed, the equity of redemption, assuming that George N. Williams was a real person, and not an alias of Jackson, was conveyed from Williams, through Moody and Dyer, to Jackson, the trustee. Jackson was a trustee for and between the owner of the note and the debtor. The effect of this conveyance was to merge the equity of redemption with the fee, but Jackson still held the title in trust, and was still a trustee for the owner of the note.

On the 3d day of August, 1872, a release was recorded, which is dated October 2, 1871, executed by Obadiah Jackson, trustee, to Charles V. Dyer, conveying and releasing the two lots from the deed of trust by Williams to Jackson, to secure the two notes for $36,000, by Williams to Waite. It appears to be acknowledged August 3, 1872, and recorded July 3, 1872, but this is proven to be a mistake, and is intended for August 3, 1872. (Rec., pp. 90, 111.)

The circumstances attending the production and recording of this release are shown by the evidence, and are these:

In June, 1872, and about the time Dyer conveyed to Jackson, $50,000 was borrowed by Jackson from Joseph and Edwin Swift, of Philadelphia, for which bonds were made and secured by deed of trust on the two lots, to Norman C. Perkins. The time is shown from the fact that the deed of Dyer to Jackson was dated June 1, 1872, acknowledged on the 14th and recorded on the 18th of the same month, while the bonds to the Swifts, and deed of trust securing them, are dated June 1, 1872, and the deed of trust is acknowledged on the 29th of the same month. (Rec., pp. 90, 95, 96.)

The broker who negotiated the loan was C. R. Field, and Norman C. Perkins was the attorney who examined the abstract of title to the lots offered as security.

Perkins was examined as a witness. The greater part of his testimony is not admissible, but certain facts appear which are sufficient to raise the questions desired. The examination was made August 1, 1872. The deed of trust by Williams to Jackson of October 1, 1868, to secure the notes for $30,000 and $6,000 to Charles C. Waite, was shown by the abstract, and no release appeared to be on record. Jackson brought to the witness a release of that trust deed dated Oct. 2, 1871; signed by himself as trustee, to Charles V. Dyer. The impression of the witness was that it was not acknowledged when it was first presented. The release was identified by the witness as the same read in evidence, and shown on page 90 of this record. Jackson stated, at the time, that the notes described in the trust deed were paid on the 2d of October, 1871, and the papers were destroyed in the great fire, which occurred October 8th and 9th, 1871, and that the deed of release was dated on October 2d, because the debt was paid on that day. The witness did not learn when it was in fact executed. (Record, pp. 108, 112, 113.)

From the fact that the papers, which would include the notes and a deed of release, were said by Jackson to have been destroyed in the fire, the inference is that a deed of release was made before the fire (and probably recorded), and that the one presented was a substitute. The court will take judicial notice that all of the records of deeds in Cook County were burned in the great fire of October 8th and 9th, 1871. It is a well-known fact that the makers of abstracts did not get a minute of the instruments recorded for the three days next preceding the fire. It has been the custom to restore the evidence of destroyed deeds by executing new ones, dated so as to correspond with those destroyed, which have been acknowledged after the fire, and then recorded. Therefore, the presentation of this release, dated six days before the fire, with the statement that the

notes were paid on the day of the date and all of the papers destroyed by the fire, was not calculated to excite any suspicion. It was the way, and the only way, in which such business has been of necessity conducted since that disastrous event.

Perkins approved of the title as free from incumbrance and vested in Jackson, and the release with the deed of trust by Jackson to Perkins, to secure the two bonds of Jackson to the Swifts for the payment of $50,000, loaned money, with interest coupons, were recorded by Perkins. (Record, pp. 105, 106, 91–100.)

At the same time, a quit-claim deed was made by Mrs. Moody to Dyer, at the request of Perkins, because the former one was by attorney, and the power was destroyed in the fire. (Record, p. 105.) This deed was dated back to June 6, 1872, and recorded August 13, 1872, and is another instance of the mode of avoiding the results of the fire. (Record, p. 118.)

The deed from Dyer to Jackson was shown on the abstract examined by Perkins, but there was no minute thereon of the part of the instrument by which Jackson assumed the payment of the $30,000 note. (Record, p. 114.) There was no actual notice to the Swifts, or to their attorney, Perkins, that the deed from Dyer to Jackson contained a recital showing the note for $30,000 was not paid when that deed was made. There is other evidence tending to show that the release read in evidence was not executed until after the fire of 1871. (Record, p. 115.) But if that fact is admitted, the paper was not presented by Jackson as such an original document, but only as a substitute.

The $50,000 borrowed by Jackson of the Swifts was to be paid by the terms of the bonds, June 1, 1877, or five years after the date thereof. The interest coupons were all paid except the tenth and last.

On the 13th day of November, A. D. 1876, Jackson being indebted to Elizabeth and Ellen Carroll to the amount of about $50,000, evidenced by his notes to them, executed a deed of trust to George Chandler, conveying these two lots to secure

the payment of the notes. This appears by bill and answer. (Record, pp. 6, 27.)

In November, 1876, Jackson became publicly insolvent. (Record, p. 120).

Retracing our steps in the order of time, we find that when the note for $30,000 was pledged by Jackson to Smith on the 18th day of April, 1871, it was left with John Watson, a brother of George Watson, and a brother-in-law of David Smith, together with the principal note of $31,500. The interest was paid with regularity by Jackson on his note of $31,500, to Oct. 26, 1876, when $1,000 was paid. (Record, p. 84).

No interest was paid on the $30,000 to Smith. The principal fell due Oct. 1, 1872, and nothing was paid on that to Smith. The note was kept by Smith, or one of the Watsons for him, without any request for payment of any one. No inquiry was made for the maker, the supposed George N. Williams. (Record, pp. 64, 65, 50).

John Watson, who had the possession or control of the $30,000 note, most, if not all of the time, *never knew a man by the name of George N. Williams.* (Record, p. 66).

Meanwhile, Jackson made payments on the $30,000 note during 1871, 1872, 1873 and 1874; the last the latter part of 1874, to Silas M. Waite, the real owner of the note, who supposed that Jackson was collecting the amounts remitted from George N. Williams, the maker of the note; and when Waite asked Jackson about the note in June, 1875, he was told it had been burned up in the fire of 1871. (Record, p. 40).

David Smith died Feb. 6, 1875, and Janet Smith was appointed his administratrix. (Record, pp. 119, 7).

PLEADINGS.

January 29, 1877, Janet Smith, administratrix of David Smith, filed her bill in chancery in the Circuit Court of Cook County, against Obadiah Jackson, George N. Williams, Norman C.

Perkins, Joseph Swift, Edwin Swift, George Chandler, Ellen Carroll, Elizabeth Carroll, Charles R. Carroll, Henry A. Gardner, Henry Truman, Michael W. Robinson, Charles V. Dyer, Horace White, and certain judgment creditors of Obadiah Jackson.

This bill states that on the first day of October, 1868, Charles C. Waite was seized in fee of lots 15 and 16. block 111, School Section Addition to Chicago, and on that day conveyed to George N. Williams, who, for a part of the purchase money, executed a note for $6,000, due in one year; and another for $30,000, due in four years, with interest, and to secure them, executed a deed of trust to Obadiah Jackson, conveying said lots, which was recorded October 24, 1868; that on the 5th day of October, 1868, Williams conveyed to Mary P. Moody, subject to the trust deed; that the note for $6,000 was paid when due, and the one for $30,000 was, before the 30th day of October, 1870, assigned by Charles C. to Silas M. Waite, and by the latter was assigned to Obadiah Jackson, about October 30, 1870, who, on the 18th of April, 1871, and before the maturity of the note, was the legal owner and holder of the note, and while the fee was in Mary P. Moody, subject to the deed of trust, became indebted to David Smith, in the sum of $31,500, and gave a promissory note for that amount, due, with interest, in two years, and at the same time assigned the note for $30,000 as collateral security; that before delivering the note, Jackson placed thereon an endorsement that all interest had been paid to May 17, 1871, since which time nothing has been paid; that Moody conveyed, May 17, 1871, to Charles V. Dyer, subject to the trust deed of Williams to Jackson, and that June 1, 1872, Dyer conveyed to Jackson, subject to the trust deed, to secure the note for $30,000, and another trust deed to Runnion, which were assumed by the grantee, and the deed was recorded June 18, 1872.

The bill further states, that the Swifts and Perkins caused to be recorded August 3d, 1872, a release purported to be dated Oct.

2d, 1871, of the deed of trust from Williams to Jackson, unto Dyer, which release was a fraud upon Smith, and without authority.

The bill then states the deed of trust to Perkins to secure the bonds to the Swifts for $50,000, and the deed of trust to Chandler to secure the notes for $50,000; and sets forth an excuse for not collecting the interest and principal of the note for $30,000.

The bill states that a judgment was rendered on the note for $31,500 against Jackson, in the Superior Court of Cook County, for $32,418, under the warrant of attorney and the filing of a creditor's bill.

The bill charges actual notice on the Swifts that the release had never been delivered to Dyer, and avers it was delivered to them, and that all of the defendants had notice of facts sufficient to put them on inquiry.

The bill prays that an account may be taken of the amount due complainant on the judgment against Jackson, and also an account of the amount due on the note made by Williams, that unless the defendants or some of them shall redeem the Williams note from the pledge made by Jackson, by payment of the amount due the complainant on her judgment, that the said lots be sold and the judgment be paid out of the proceeds, and that the defendants be foreclosed of all equity of redemption and all estate, right and title in the premises sold, unless the same shall be redeemed from such sale according to the statute. (Record, pp. 2-11.)

Answers were filed by the Swifts, the Carrolls, Perkins and Chandler, (Record, pp. 16-29), and default was taken against the other defendants. Three or four writs were returned without service on George N. Williams, and on publication of notice a default was taken against him. (Record, pp. 30-33.)

On the petition of the Swifts the cause was removed from the Circuit Court of Cook County to the United States Circuit Court for the Northern District of Illinois. (Record, pp. 42-43.)

Decree.

On the 6th day of October, 1877, a final decree was entered by the United States Circuit Court, after a hearing upon the pleadings and proofs, and the court found there was due to the complainant, upon the note made by Obadiah Jackson, $34,658, and that the complainant was entitled to the lien created by the note made by George N. Williams, dated Oct. 1, 1868, and the trust deed securing the same, and entitled to enforce the same to the extent necessary for that purpose, and also held that said lien was prior to that of any of the other parties to this suit.

It was ordered that, unless the defendants, or some of them, pay within one hundred days to the complainant $34,658 and the costs, that the premises described in the trust deed, viz., lots 15 and 16, block 111, School Section Addition, etc., be sold at public auction by Henry W. Bishop, the Master in Chancery, and that said master give public notice of the time and place, according to the course and practice of the court, and that for the purpose of making the sale under said trust deed in pursuance of the powers therein contained, said Henry W. Bishop is substituted as a trustee in place of said Obadiah Jackson, as trustee thereunder, to carry into effect and execution the trusts thereby created.

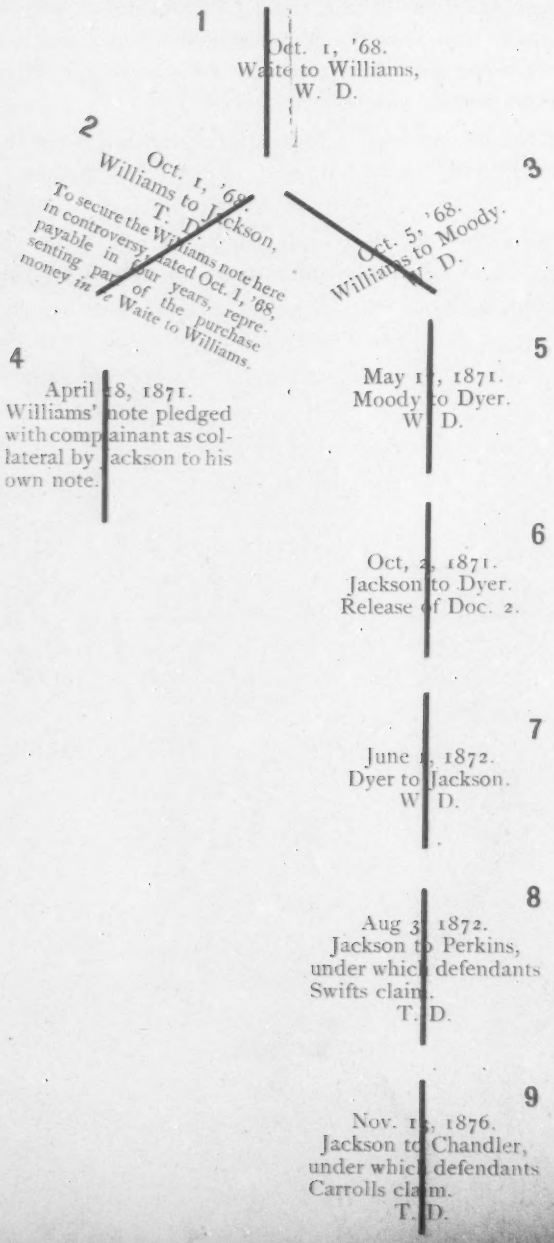
It was further ordered that the master, out of the proceeds of the sale, pay his own fees, commissions and disbursements, and to the plaintiff her costs and the sum of $34,658, with interest from the date of the decree, and if any surplus, that he bring that into court. It was ordered that the purchaser be let into possession on production of the master's deed and a certified copy of an order confirming the report of the sale, and if the amount is not sufficient to pay the amount found due, with the interests and costs, that the master specify the amount of the deficiency for the further action by the court.

It was further ordered that, in case a sale and conveyance be made under the decree, the defendants and all persons claiming under them since the commencement of the suit, be enjoined from claiming any interest in the premises, and the injunction be made perpetual. (Record, pp. 80, 81, 82.)

It will be observed that the decree does not follow the prayer of the bill, and that no time is allowed for redemption after the sale.

From this decree Joseph Swift, Edwin Swift, Elizabeth Carroll and Ellen Carroll prayed an appeal to this court. (Record, p. 82.)

DIAGRAM OF CHAIN OF TITLE.—TITLE ORIGINALLY IN C. C. WAITE.



Assignment of Errors.

The appellants complain of the decree, because,

First. The court allowed the complainant a greater amount than was due.

Second. An absolute sale was ordered foreclosing the equity of redemption, and the master directed to make a deed, when a certificate only should have been made, and fifteen months allowed for redemption according to the statute of Illinois.

Third. The court held that the complainant had a lien on the lots described in the bill by virtue of the deed of trust purporting to be made by George N. Williams to Obadiah Jackson.

Fourth. The court decided that the complainant had a prior lien by virtue of such deed to the appellants, Joseph Swift and Edwin Swift, and also to the appellants, Elizabeth Carroll and Ellen Carroll, and in ordering the complainant to be paid in advance of the appellants, Joseph and Edwin Swift or Elizabeth and Ellen Carroll.

Fifth. The court did not dismiss the bill of complaint.

Points and Authorities.

I.

The court found to be due to complainant $34,658, *while the correct amount was* $34,103.73, *being* $554.27 *too much.*

The bill states a promissory note made by Jackson to complainant's intestate for $31,500, and a judgment thereon in the Superior Court of Cook County, Nov. 24, 1876, for $32,418, damages and costs. (Record, pp. 4, 7.) The effect of the judgment was to merge the note into the judgment, which by the statute of Illinois drew six per cent. interest. (Rev. Laws of 1874, Ch. 74, § 3.) The interest at that rate from the date of the judgment to October 6, 1877, the date of the decree, $1,685.73, making a total amount of $34,103.73.

It is true the judgment was not read in evidence, but the note was. That would not enable the recovery of an amount contrary to both the averment, and prayer of the bill. But if it did, and the amount be computed on the note for $31,500 itself, the interest is $2,696, which added to the principal make $34,196, a sum $462 less than allowed by the decree.

II.

A strict foreclosure was decreed and a deed ordered to the purchaser, with an order for possession, and perpetual injunction, instead of a certificate of purchase, and a period of redemption for fifteen months. (Record, pp. 80, 82.)

Brine v. *Insurance Co.*, 96 U. S., 627.

III.

No lien was created by the deed of trust purporting to be made Oct. 1, 1868, by the supposed George N. Williams to Obadiah Jackson, because Williams was a fictitious person, or an alias of Jackson, and that being so, the pretended deed was void, as no man can convey to himself.

3 Wash on Real Prop. * 567.
Miller v. *Chittenden*, 2 Iowa, 368.
Hulick v. *Scovil*, 2 Gilm. Ill., 191.

IV.

The note for $30,000 *purporting to be executed by Williams did not belong to the complainant, but to Silas M. Waite, and, therefore, the complainant was not entitled to a lien.*

Broom's Legal Maxims, 689.
Smith v. *Ayer*, 101 U. S.

V.

The complainant did not have a lien, if any, prior to the Swifts or the Carrolls.

The act of Jackson, the trustee, in making the release, and causing it to be recorded protects the appellants from the Williams deed of trust.

C. K. I. & P. R. R. Co. v. *Kennedy*, 70 Ill., 360.
Miller v. *The R. & W. R. W. Co.*, 36 Vt., 452.
Munn v. *Burgess*, 70 Ill., 604.
Robbins v. *Kinzie*, 45 Ill., 356.

VI.

The complainant is not entitled to relief because of laches.

Story's Eq. §§ 64 a, 1520.
Munn v. *Burgess*, 70 Ill., 604.
Harwood v. *Railroad Co.*, 17 Wallace, 78.
Twin Lick Oil Co. v. *Marbury*, 1 Otto, 587.
Cox v. *Montgomery*, 36 Ill., 396.
Hamilton v. *Lubukee*, 51 Ill., 416.
Winchell v. *Edwards*, 57 Ill., 41.
Dempster v. *West*, 69 Ill., 614.
Kenyon v. *Schrick*, 52 Ill., 384.
Robbins v. *Bates*, 4 Cushing.

ARGUMENT.

The decree in this case must be reversed, because the amount found to be due is too large and the statutory redemption is cut off, as stated in the first and second points, and the case remanded. There is no answer to these propositions. The question arises, shall directions be given to enter a decree in favor of the complainant? Or, will this court express an opinion upon the other points presented by the record? This leads to a discussion of the third, fourth, and fifth points.

III.

No lien on the lots was created by the deed of trust purporting to be made Oct. 1, 1868, by the supposed George N. Williams to Obadiah Jackson.

Both sides claim title from a common source, C. C. Waite, and the complainant may urge that the defendants, in proving Williams a myth, have unsheathed a sword that cuts both ways —that, if he *is* a myth, the defendants cannot deraign title from Waite. The claim is specious, but pour upon it the light of analysis, and only a shadow remains. Deeds, are but sealed contracts, and, in both cases, the rule as to parties is the same. The essence of the rule is best expressed by the canon of the Civil Law, which requires that, in contracts, as to parties, there must be *conflicto mentium, a conflict of minds.* In other words, the rule requires that, in a deed of land, there shall be two opposing negotiators, occupying the positions of vendor and vendee. *Whether these negotiators are rightly named in the deed is of no consequence. It is enough if they can be identified.* The rule does not require that the John Doe and Richard Roe named in a deed as grantor and grantee shall exist, *by those particular*

names, but only demands that a grantor and grantee shall exist by *some* name, and in a way that is capable of identification. And such is the case, so far as these defendants are concerned, in this entire chain of title, from Waite to Perkins. In the deeds from Waite to Williams, and from Williams to Moody, there is no defect as to parties. Williams, in both deeds is Jackson. In the first he is grantee, and, in the last, grantor. Waite testifies that he "knew nobody in the transaction but Jackson;" that he proposed the sale, and Waite accepted the proposition, and Jackson paid Waite the $6,000, and sent him the Williams notes. Waite and Jackson were two opposing negotiators, occupying the respective positions of vendor and vendee, and whether Jackson figured in the transaction by the name of Williams, or by any other name, the deed is valid, and the title passed. The same reasoning applies to the deed from Williams to Moody; but the fatality in the *trust deed* from Williams to Jackson, as to parties, is, that there were no opposing negotiators, acting as grantor and grantee, but Jackson, *as* Williams, was essaying to convey to himself. But if the deed from Waite to Williams were void, the complainant would not be entitled to a decree. She must prevail by her own title, and not by the absence of title in the defendants.

The theory of the complainant is one made necessary by the averments of the bill, that George N. Williams is a real person, who executed the note and deed of trust. This she affirms, and this she must prove. The theory of the defendants is, that Jackson, as agent, for Waite, sold the lots to Moody for $60,000, and in order to defraud his principal, caused the deed to be made by Waite to the supposed Williams, with a consideration of $46,000, and notes for $36,000, the deferred payments to be made to Waite by the supposed Williams, and a deed of trust to be executed by the supposed Williams to himself, and also a deed to be made by the supposed Williams to Moody, subject to the encumbrance for $36,000, which the grantee assumed as part of the purchase money. By this

means Jackson received $24,000 cash from Moody, of which he accounted for only $10,000 to Waite, thereby keeping $14,000 for his own use.

What is the evidence to sustain the respective theories? What is the conclusion?

The complainant produced a note for $30,000 with the name George N. Williams signed thereto, and a deed of trust with the same signature to Jackson, which had a certificate of acknowledgment by Hoffman, a notary public, that George N. Williams was personally known to the officer to be the person whose name is subscribed to the deed.

The complainant rested on that proof, and no other was produced by her either in chief or rebuttal. The power to confess judgment attached to the note, had the name of Jackson as a subscribing witness, yet he was not called to prove the execution. No one was called to prove the execution or genuineness of the signature. The only evidence of the execution of the deed was the statutory certificate of acknowledgment, and the only testimony of the execution of the note was the recital in the deed of trust. No one was called to prove there was such a man in existence or ever had been.

From the statutory certificate the presumption arose that the officer performed his duty, and stated the truth, and from this it is further presumed that the note was executed by George N. Williams, because it is so recited in the deed.

It is admitted that this was enough to entitle the complainant to a decree, in the absence of any other testimony, but it is the least in degree to justify such a result. It, at most, barely creates a presumption that there was such a person *in esse*, that he signed the note and executed the deed. The defendants were required by the rule of law to meet that presumption, and shift the *onus probandi* back to the complainant.

The defendants undertook to do this by proving facts from which their theory would be legally inferred.

First. Hoffman, the notary, was called as a witness, and testified that he did not personally know a man by the name of George N. Williams, that some one was introduced to him as the person who signed the deed of trust by Jackson. Thus the statement of the certificate is proved by the direct testimony of the man who signed it not to be true, and therefore the presumptions fell with it.

Second. The transaction between Waite and Williams, and Williams and Moody was one. This appears from the fact that the three deeds were all recorded on the same day, October 24th. In the ordinary course of business, the deed from Waite to Williams would go to New York and return in five days. This deed is dated Oct. 1st, and the deed from Williams to Moody is dated Oct. 5th. The acknowledgment to the trust deed is dated October 13th. The deed from Waite to Williams, and the trust deed from Williams to Jackson were filed for record at the same time with the deed from Williams to Moody, (Record, pp. 88, 118), thus showing that the transaction for Waite was not concluded until the sale was concluded with Moody. It is incredible that Williams should buy this property for $46,000 and before he had concluded the trade, have re-sold it for $60,000, without some pre-arrangement. If Jackson sold his principal's lots for $46,000, which were worth $60,000, he was guilty of gross carelessness or actual fraud.

Third. No such man as George N. Williams was ever seen or known, but Jackson was always found in the front. Hoffman signed the certificate of acknowledgment, but he testified that the man purporting to be Williams, was introduced by Jackson, and that he did not then, nor since, know such a man, (Record, pp. 62, 61). Waite was in New York and Jackson in Chicago. Jackson was authorized to sell, and he sent a deed to Waite for execution, which was signed, acknowledged, and returned. Afterwards Jackson sent $10,000 in cash, one note for $6,000, and another for $30,000, purporting to be signed by Williams. Waite never knew a man by the name of George

N. Williams. The only person he knew in the transaction was Jackson. (Record, pp. 37, 38, 39.) Parker, an agent, in charge of the property, engaged in collecting the rents for Waite, when it was sold, did not know George N. Williams. The only man he knew in connection with it was Jackson. (Record, p. 70). S. M. Waite, to whom the note was assigned, left it with Jackson for collection, and received, from time to time, money on it from Jackson up to the latter part of 1874, and the only person known to him was Jackson. (Record, pp. 39, 40). George and John Watson had sole charge of the note from April, 1871, for David Smith, and his administratrix, and neither of them ever knew any such man as George N. Williams. (Record, pp. 66, 49, 50). Moody, who was the husband of the grantee in the deed from Williams, and transacted the business is dead. (Record, p. 118). So that for a period of more than eight years no one who naturally would know of such a man, if there was one, ever knew him, but instead, Jackson seemed to stand for him.

Fourth. Jackson was not called as a witness by the complainant, from which the presumption arises that he could not identify or disclose a real person bearing that name who gave this note. It was not incumbent on the defendants to call Jackson, because it could not be expected he would testify to his own crime, while, if the complainant is in the right, he could readily disclose Williams.

Fifth. Williams, as the maker of the note, was made a defendant to the bill. Four writs were issued for him, and returned not found. William T. Burgess, complainant's solicitor, then made an affidavit that Williams had departed from the State, and he had been informed that he resides at Buffalo, New York, Publication was then made against him, on which a default was taken against him. He never appeared in the case. (Record, pp. 11, 12, 13, 14, 30, 33.)

Do not these facts prove the theory of the defendants to be correct?

Has not the weak presumption from the complainant's testimony been met and overthrown? Has not the *onus probandi* been shifted?

The allegation that the note was made by Williams, and that he was a real person, is an affirmative proposition, capable of affirmative proof. The assertion that there is no such man, and the note was not made by him, is a negative proposition, and can only be proved by circumstances and indirect evidence. Yet the complainant made no effort to rebut. It is, therefore, contended that the complainant has not only failed in proof, but the conclusion is established that Jackson was the real Williams, who was used as a myth to swindle Waite.

If there was no grantor to the deed, or if Jackson made the deed in the name of Williams to himself, then there was no deed, and no lien by virtue of the apparent deed.

"There must be a person *in esse* to give as well as receive "a conveyance, in order to make a deed of an immediate estate "by or to such person good. And if there be any reasonable "doubt of such person being *in esse* at the time of the delivery "of the deed, it must be affirmatively shown that he was so, in "order to give the deed validity."

3 Wash. on Real Prop., * 567.
Miller v. *Chittenden*, 2 Iowa, 368.
Hulick v. *Scovil*, 2 Gilm. Ill., 191.

The circuit judge, in delivering his opinion, said it would make no difference, even if Williams was a fictitious person, because Waite, through whom the parties claim title, would be estopped from setting up any right to the property after what had taken place. This is an evident misapprehension. It is true that Waite, after having made a deed to Williams and other persons having purchased the property on the faith of that deed, would be estopped from recovering back the land upon the ground that there was no grantee. But that is not the question in this case. On the contrary, the appellants affirm the val-

dity of that deed. If it was not a deed to Williams, it was to Jackson by the name of Williams, and the appellants all rest on the deed from Jackson, whose only title was derived from and under Waite.

It is the trust deed purporting to be made by Williams to Jackson which is in controversy. The appellants claim that Waite acquired no security or lien by virtue of that deed, because it was a deed of Williams, a fictitious person, or Jackson by the name of Williams to himself. In the first case it is void for the want of a grantor; in the second, because a man cannot convey to himself. The appellants do not claim under the disputed trust deed, but against it. Their trust deeds were made by Jackson, and the question is, who has the prior valid lien? The appellants have done no act to raise an estoppel *in pais*, and made no deed which will constitute an estoppel by seal.

But if the court does not think the evidence rebuts the presumption in favor of the complainant on this point, and shifts the *onus probandi*, the appellants respectfully ask leave to introduce other evidence in the court below to which the case must be remanded, because of other errors. Since this case has been tried, facts have been developed by which it can be certainly shown that there was no such man, and Jackson was the real person.

IV.

THE NOTE FOR $30,000 PURPORTING TO BE EXECUTED BY WILLIAMS, DID NOT BELONG TO THE COMPLAINANT, BUT TO SILAS M. WAITE, AND, THEREFORE, THE COMPLAINANT WAS NOT ENTITLED TO A LIEN.

The bill avers that after the 30th day of October, 1870, Silas M. Waite assigned the note for $30,000 to Obadiah Jackson, who thereby became the legal owner and holder thereof, and being such owner and holder on the 18th day of April, 1871,

and entitled to receive the money to become due thereon, the said Obadiah Jackson assigned the same to David Smith as collateral security for a note of $31,500, and thereby the said David Smith in his lifetime, and the complainant, his administratrix, since became and now is the legal owner and holder of the Williams note for $30,000. (Record, pp. 3, 4.)

The defendants neither admitted nor denied these statements, but demanded strict proof to sustain them. (Record, pp. 18, 28.)

The issue was thus made as to the right of the complainant to collect the money due on the Williams note and to enforce the trust deed. Unless the complainant was equitably entitled to collect the money, she had no standing in a court of equity, and must fail. For the purpose of the argument of this point, it is assumed that the note was genuine.

The testimony of Silas M. Waite proves conclusively that he was the owner of the note, and entitled to receive the money to be paid thereon; that he never sold or hypothecated the note to any one, but left it with Jackson solely to collect, and at Jackson's request endorsed it in blank for the purpose of collection. Jackson recognized the ownership of S. M. Waite by remitting money, as collected thereon, until the latter part of 1874. Jackson admitted the ownership of S. M. Waite, and that he held the note for him for the purpose of collection by entering the payment of five installments of interest on the back of the note, which he signed "S. M. Waite, by O. Jackson."

There was not only no attempt to contradict this evidence, but it has been admitted to be true.

The answer made by the appellee is, that the note was assigned to Jackson, was found in his possession with a blank endorsement, and before it was due Jackson assigned it to David Smith, as collateral security. The rule of the Law Merchant as to negotiable paper is invoked, and it is claimed that the complainant's intestate acquired the note, for a good consid-

eration, before due, without notice that Jackson was not the real owner. The reply to this position is, that David Smith had notice that Jackson did not hold the note as owner, so that he could lawfully pledge it to secure his own debt, or at least that he had knowledge of such facts as charged him with the duty of enquiry, which is the equivalent of notice.

George Watson, who took the note of Jackson, as agent for David Smith, *knew that Jackson was the trustee, and he did not inquire even of Jackson, whether he held the note as trustee or owner, and he further knew that Jackson was using the note as a pledge for his own debt.* (Rec., pp. 49, 53.) This was gross negligence. Watson examined the abstract of title, the trust deed, and the note with the endorsements, but did not ask Jackson who owned the note. He supposed he did own it, from the fact that it was assigned by C. C. Waite to S. M. Waite, and by him in blank. But while he was getting this information from the back of the note, he also learned that Jackson had this note in his possession for S. M. Waite, from the 27th day of April, 1869, to the time it was pledged, and that on the 27th of April, 1869, Oct. 1st, 1869, April 1st, 1870, and Oct. 1st, 1870, he had received the interest due *for* S. M. Waite, and signed receipts for the same "*S. M. Waite, by O. Jackson.*" Watson further knew that Jackson received and endorsed the payment of interest for S. M. Waite for *one month in advance of the time he pledged the note*, thereby showing that the note was owned by S. M. Waite at the precise time Jackson pledged it as security for his own debt.

The possession of this note by Jackson was consistent with the ownership by Waite of the note, for Jackson was the trustee, and lawfully could hold the note. It will be said the note was assigned to Jackson; but assignments of negotiable paper are made for purposes of collection, as well as to transfer the title for a good consideration. In this case it was the duty of Watson to inquire the purpose for which the assignment was made, because he was dealing with a trustee,

and because he was informed by the entries on the note that Jackson had and then held the note as agent, trustee or attorney, to collect for S. M. Waite, who was in fact the real owner.

Under these circumstances, as David Smith failed to acquire a good title to the note, Waite could recover the note or the proceeds from him.

"A stolen note could not be said to be taken *bona fide* by "one who had notice or knowledge of the theft, or who, hav- "ing a suspicion thereof in his mind, and the means of knowl- "edge in his power, wilfully disregarded them."

Broom's Maxims, *689.

In the case of *Smith* v. *Ayer*, decided at the last term of this court, it was held that where an executor pledged a note payable to his testator, to secure a debt of a firm of which the executor was a member, even where the testator had been a member of the same firm, and the executor had been directed by the will to continue the business, the pledgee acquired no title, and allowed the representative of the estate to recover the pledged note. It was said to be the rule that the fact that the trustee proposed to use the note for his own benefit was enough to put the person receiving it on inquiry, and no valid title could be obtained. In that case Mr. Justice FIELD says:

"The law exacts the most perfect good faith from all parties "dealing with a trustee respecting trust property. Whoever "takes it for an object other than the general purposes of the "trust, or such as may reasonably be supposed to be within its "scope, must look to the authority of the trustee, or he will act "at his peril."

"The adjudications in support of this doctrine are very numerous. The doctrine pervades the whole law of trusts. In *Colt* v. *Lasnier*, reported in 9th Cowen, Chief Justice SAVAGE, of the Supreme Court of New York, after reviewing the cases, concludes that the correct rule, both in England and in that

State, is: 'That any person receiving from an executor the assets of his testator, knowing that this disposition of them is a violation of his duty, is to be adjudged as conniving with the executor, and that such person is responsible for the property thus received, either as purchaser or pledgee.' And so in many cases it has been held that the payment by the executor of his own private debt with the assets of the testator is a *devastavit*, that is, a wasting of the estate. There are, indeed, some exceptions to this, as where the executor has paid debts of the testator with his own money to the value of the assets used. But, beyond a few exceptions of this kind, such a use of the assets is considered entirely indefensible, and the party receiving them will not be permitted to retain them on the ground that the transaction itself gives him notice of their misapplication, and thus necessarily involves him as a participator in the fraud. And the doctrine is supported by many authorities, that where a party has reasonable grounds for believing that an executor intends to misapply them, or is in the very transaction converting them to private uses, such party can take no advantage from the transaction. In the case of *Miller* v. *Williamson* the Court of Appeals of Maryland held that the fact that the executor made an assignment of such assets to secure a debt owing to parties by a mercantile firm of which he was a member, was sufficient, in contemplation of law, to notify them that he was about to commit a *devastavit*. (5 Md., 219.) And where an administrator had assigned promissory notes of the estate in his hands for goods for his own use, the Supreme Court of Indiana held that it was a waste of the assets; and that if the assignee had knowledge, even from the nature of the transaction, that the administrator was thus acting in violation of his trust, the right of property in the notes was not divested, and he could not hold the notes of profit by such assignment as against those rightfully entitled to them. (*Thomasson* v. *Brown*, 43 Ind., 203. See also *Field* v. *Schieffelin*, 7 Johns. Ch., 150, and *Petrie* v. *Clark*, 11 Serg. & Rawle, 336.)"

No other authority need be cited, for the law of this court is settled.

It may be said that the defendants could not dispute the ownership, and Waite alone could raise that question. The answer is, *first*, the complainant must show *her* right to relief; *second*, she must prove the allegations of the bill; *third*, the decree does not bind Waite, and will not bar him from recovery against the defendants, so that they may be compelled to answer twice; *fourth*, the defendants may have a defense against Waite, which is not available against the complainant.

V.

The complainant did not have a lien, if any, prior to the Swifts or Carrolls.

1. The act of Jackson, the trustee, in making the release, and causing it to be recorded, protects the subsequent mortgagees, the appellants, from the Williams deed of trust.

It may be admitted that the note was not paid, and that Jackson executed the release fraudulently. *He was expressly authorized by the deed to make a release, or satisfaction, when the debt secured was paid.* That power had not been cancelled. Jackson still remained a trustee for the holder and owner of the note, with authority to declare the lien ended when the note was paid.

"If a trustee once accepts the office, he cannot, by his sole "action, be discharged from its duties. Having once entered "upon the management of the trust, he must continue to per- "form its duties until he is discharged in one of three ways, "first, he may be removed and discharged, and a new trustee "substituted in his place, by proceedings before a court having "jurisdiction over the trust; second, he may be discharged, and a "new trustee appointed by the agreement and concurrence of "all parties interested in the trust; and third, he may be dis-

"charged, and a new trustee appointed, in the manner pointed "out in the instrument creating the trust, if it makes any pro- "visions on that subject."

Perry on Trusts, § 274.

Jackson did not cease to be a trustee in any one of these modes. He received a deed from Dyer, who had the equity of redemption, and took such title subject to the incumbrance. Williams still remained liable on the note; S. M. Waite owned the note, and Smith held it. Jackson was as much a trustee and agent for the owner and holder of the note as before. He could be required to sell under the power, in case of default, and to declare the note satisfied, when it was paid. If default was made, Jackson would lose the equity of redemption, which he obtained by the deed from Dyer, and that was the only consequence to affect him from the new relation. Suppose the note had been paid by Williams or Dyer, could not Jackson bind Waite or Smith by a declaration that the note was paid? He was authorized to do so by the terms of the deed, and that was in force.

The effect of the deed by Dyer to Jackson, did not change the trust or relation of the parties, other than it gave a full title to Jackson on his payment of the debt, instead of Dyer. There was, in a sense, a merger of the equity of redemption, with the fee held in trust, but it did not in the least defeat the rights of the *cestui que trust* or end the powers or duties of the trustee.

By conveying lands to a trustee, both the borrower and lender say to the world, we will be bound by all acts of the trustee touching the fee of the land that do not transgress the letter of the powers conferred upon him by the deed. A trustee may, by his acts touching the fee, commit gross frauds upon the borrower or lender, one or both; but if such acts, though fraudulent, are within the letter of the power, and the party dealing with him has no notice of the fraud, both the borrower and the lender are concluded. This is true of any and all acts

of the trustee, whether written or spoken, and any paper that he may execute, or statement that he may make, touching the fee of the land, *within the letter of the power given by the deed*, the law permits the world to accept and act upon as valid and true. All parties, moreover, buying commercial paper secured by trust deeds, as the complainant here has, put themselves in the shoes of the original lender, and, like him, adopt the trustee, and agree to be bound by his acts, within the letter of the power given by the deed. And this is a commercial necessity. To hold otherwise, would make all dealings in land uncertain and indefinite, and titles would never be quieted.

C., R. I. & P. R. Co. v. *Kennedy*, 70 Ill., 360 and 361.

In this case the court uses the following language upon the question as to how far the act of the trustee is binding upon the borrower and the lender:

" Inasmuch as the person executing the trust deed selects the " trustee, and chooses to invest him with such large powers over " the title and his pecuniary interests, it may be seriously doubt- " ed whether he should not be required to sustain the injury " flowing from the abuse of that power, rather than an innocent " purchaser, who is led to believe that he can rely upon the in- " tegrity of the trustee chosen by the person creating the trust. " One of two persons must suffer the loss, and it would seem " but equitable and just that it should be borne by him who has " enabled the trustee to commit the fraud, or from negligence " or incapacity has done the wrong.

" To hold that the purchaser must, at his peril, know that " the debt is not paid, or lose the land and the money for it, " would seem to be a rule that would, in many cases, operate " harshly, if not very unjustly. The mere production of the " notes by the creditor would not prove the fact, as payment is " frequently made and receipts given, and the notes neither " taken up nor canceled; or the maker may be absent and in-

" accessible to the purchaser, or a variety of contingencies may " be supposed, which would render it difficult, if not impracticable, to ascertain the fact. To so hold, would greatly depreciate the price of property, not only at the trustee's sale, " but in all others subsequently made, until the debt should be " barred by the statute of limitations, or a release of the debt " should be procured from the creditor."

This view is also upheld in *Miller* v. *The R. & W. R. W. Co.*, 36 Vt., 452, where the question arose as to how far the act of the trustee was binding upon the borrower and the lender.

BARRETT, J.:

" We are unable to assent to the proposition, that the trustees " are only the agents of the *cestuis que trust* for the purpose of " holding the legal title. They are agents for holding just such " title as is created by the transaction, and for administering it " according to the terms of the trust, and whatever title the " *cestuis que trust* have, whether legal or equitable, is through " and by reason of the title conveyed to and held by the trustees. " Even if it should be granted that the trustees were agents for " the purpose merely of holding the legal title, still, as the " rights of the *cestuis que trust* depend upon and are to be " asserted through that legal title, whatever affects such legal " title in its creation in the trustees, must affect the rights and " interests that are dependent upon it. If the legal title is " charged with an incumbrance in its creation in the hands of " the trustees, it is difficult to see how the *cestuis que trust* can " have an equity suspended from that legal title that shall override such encumbrance. However that might be as a proposition applicable to a dry trust, still, as to a trust which, in " addition to holding the title, is administrative of the property " for the purpose of effectuating the security, the trustees must " be regarded as the agents of the *cestuis que trust* with reference " to all their rights and interests, both in the title held and in " the administration of fruits of the trust, according to its terms

" and legal operation. In *Sturges & Douglas* v. *Knapp, et al.*, " 31 Vermont, 34, it was held, that a mortgage by a railroad " company, where the only trust expressed was to hold the " property to secure the payment of the bonds named, created " an active administrative trust, even after a foreclosure under " which the trustees were authorized to make a lease of the " road and property for ten years, against the protest and re- " monstrance of a large majority in amount of the bondholders, " though contrary to my own opinion. But it is the adjudicated " law on the subject in this State. In the present case, however, " the second and third mortgages provide specifically and in " detail for the administration of the property, after the conditions " shall have been broken, for the satisfaction of the rights and " interests of the bondholders under the mortgages. The fact " that the bonds are negotiable, and pass from hand to hand " like bank-bills, does not affect the question of the agency of the " trustees in reference to the security provided by the mortgage. " Such bonds purport to be secured by a mortgage in trust to " trustees who are designated and known. They are negotiated " and purchased on the credit of the security thus existing. " That security consists in the title and property which exist in " the trustees. *By the purchase of the bonds, the purchaser* " *voluntarily adopts the security as it exists in the trustees, and* " *becomes cestui que trust under them, thereby adopting said* " *trustees as his agents for holding the existing title and ad-* " *ministering the property held thereby to the intents specified* " *in the creation of the trust.*"

But it is said that, although Jackson continued to be a trustee, he also had a personal interest in the land acquired by virtue of the deed from Dyer, and a personal interest in the debt, by reason of his assumption of it in accepting the deed from Dyer; and that his declaration in his own interest ought not to have been received without further inquiry.

There is an apparent justice in this position, but it is not sound in principle or sustained by authority. It has frequently

happened that a trustee has an individual interest adverse to his duty as trustee, as in cases where an heir or legatee is executor. In all such instances, the question is as to the power and the knowledge of the person dealing with the trustee. Smith holding the note for $30,000, allowed Jackson to remain in the position of trustee after the conveyance by Dyer. If he distrusted Jackson he could have had him removed and a new trustee appointed. This he did not do. He was satisfied to leave the power in Jackson's hands, notwithstanding his newly-acquired interest, and thereby Jackson continued to be held out to the world as a person to be trusted as the agent of the holder of the note. If the power was exercised to the injury of Smith, the sole remedy was against Jackson, in the absence of acts by the Swifts or Carrolls, which would make them participants in the fraud.

Having discussed the law, let us apply it to the facts of this case:

FIRST, *As to the Swifts.*

SECOND, *As to the Carrolls.*

In June, 1872, Obadiah Jackson applied to Joseph and Edwin Swift, of Philadelphia, to borrow $50,000 for five years, and offered as security these two lots. The application was accepted, subject to the approval of the title by Norman C. Perkins, an attorney, of Chicago. The great fire had burned all of the public records and a large proportion of private papers, in October preceding. The only sources left for the determination as to titles, consisted of abstracts of title made from minutes belonging to private individuals, who were engaged in the business of making such abstracts, before the fire, from the public records, and often from such memoranda as they had preserved. These abstract-makers had no minutes of the instruments recorded for the three days preceding the fire, on October 8, 1871. Such an abstract was examined by Perkins, who found the deed of trust from Williams to Jackson, but failed to find a release or

re-conveyance of record. Subject to that, Jackson seemed to have a good title. Although Jackson was vested with the equity of redemption, yet, as the abstract appeared, he was also the trustee. There was nothing to show his removal. He was properly regarded by Perkins as the proper person, being the trustee, to ask in regard to the incumbrance. He did ask, and Jackson produced a release from the deed of trust, dated October 2, 1871,but not recorded—perhaps not acknowledged—and said the note was paid on the day of the date of the release, and all of the papers had been burned up in the great fire of October 8 and 9, 1871. The release ran to Dyer, who, on the 2d of October, 1871, held the title, subject to the mortgage. When this release was actually made, Perkins did not learn. It now appears that it was made after 1871, and probably Perkins ought to have concluded that it was made near the time it was produced by Jackson. But, if he should have known this, it was accompanied by a statement that the papers were destroyed in the fire, and as it was an every day occurrence to make new deeds instead of those burned, there was nothing in that fact to arouse the suspicions of any man. Even if the release was not executed till August, 1872, it was proper and effectual to make it to Dyer, a former owner.

Robbins v. *Kinzie*, 45 Ill., 356.

It was not the duty of Perkins or his clients to go beyond Jackson the trustee, for he was allowed to stand as the trustee and agent.

The Swifts are upon these facts, and of the law, fully justified in assuming the Williams note to be paid and accepting the security tendered for their $50,000.

But it is said, there was a recital in the deed of Dyer to Jackson, showing the note was not paid on the 1st of June, 1872, and that Jackson by accepting that deed admitted the note was not paid. The proof shows that there was no minute of such a recital in the abstract, so that as matter of fact Perkins did not

know of such a statement. The Swifts were in Philadelphia, and had no personal and actual knowledge of any kind.

It is true that the rule of law is that every person is deemed to have constructive notice of the recitals in the deeds under which he claims; and therefore there was such constructive notice of the recital in the Dyer deed. Taking that in its largest sense, the Swifts would have learned that the debt could not have been paid, and the incumbrance released in October, 1871, and that either the recital or Jackson's statement could not have been true. It was possible that such a recital might have been made by Dyer as grantor, although the debt had been paid, and if the release had been made, and it with the record destroyed, he might require his grantee to take all chances of trouble from the situation. It is true that the note had not been paid, but there was nothing beyond this recital to give information on the subject. So it may easily be seen that a prudent man might under these circumstances have accepted the security, even with actual knowledge of this recital.

We admit the full force of the fact, and the rule that in accepting this security for Jackson's own debt, and in dealing with a trustee, that the Swifts were bound to inquire into his authority. If they knew or had reason to know that he was violating his duty, they could acquire no rights against the *cestui que trust*.

As to the Carrolls the case is wholly different, In November, 1876, Jackson gave the deed of trust to Chandler to secure notes to the amount of $50,000, to the Carrolls. At that time the Williams note had been due for more that four years, the release of the trust deed had been recorded for more than four years. Jackson had, as shown by the record, ceased to be a trustee for more than four years. At that time the records showed the incumbrance in favor of the Swifts for $50,000, which had been standing unquestioned for four years of the five for which the debt was to run. No assertion of the Williams note had been made during all of that time. The act of

the trustee in executing the release had been acquiesced in for over four years, and thereby it was affirmed. The records showed that the holder of the Williams note if not paid, had allowed Jackson to remain as trustee after he had become the owner of the equity of redemption, and no subsequent steps been taken to disavow his act as a trustee.

It cannot be successfully maintained, that Smith having taken the note as collateral security in April 1871, could lie still, disregard all the subsequent facts of record, and assert his note any time till barred by a limitation law, because he had an agent and trustee, who by the terms of the deed of trust was authorized to say when the note had been paid, and release the lots from the incumbrance, and when that agent and trustee acted in that behalf, Smith, the holder, and Waite, the real owner, acted, they spoke by and through Jackson. When the Carrols acted on that declaration and act, affirmed by the lapse of over four years, (apparently five), they are bound and estopped.

Admit that the Carrolls had constructive notice of the recital in the deed from Dyer to Jackson, that would merely be enough to require them to examine further. Whether the note was paid the 2nd of October, 1871, or the 3rd of August, 1872, was immaterial as to them. They may have ascertained from the acknowledgment and recording, perhaps otherwise, that the release was not made at its date or till after the date of the Dyer deed. Yet there it had stood from the 3rd of August, 1872, to the 13th of November, 1876; Jackson all the while claiming to be the owner and in possession, the Swift mortgage standing on the property, with no protest from the owner or holder of the Willams' note that it was unpaid. Jackson was allowed to assert that he had ceased to be a trustee and become full owner, without any objection.

This was all enquiry required by the recital.

Who is to bear the damage from the fraudulent act of Jackson as between these two parties?

Smith who by silence and acquiesence confirmed the act of his agent and trustee, and who by speaking and enforcing their lien might have prevented all loss, or the Carrolls' who are guilty of no fault whatever?

The Carrolls had the right to rely on the presumption that the trustee had done his duty.

Munn v. *Burgess*, 70 Ill., 604.

VI.

THE COMPLAINANT IS NOT ENTITLED TO RELIEF BECAUSE OF LACHES.

Every case is to be decided in equity on its facts in determining the question of *laches*. The statute provides a limitation to bar actions at law, and courts of equity, with some exceptions, will refuse relief where an action at law on the same matter will be barred. But equity declines to give relief where the delay has been such as to make it inequitable to others, who have acquired subsequent rights, regardless of any precise time.

Harwood v. *Railroad Co.*, 17 Wallace, 78.

This was a bill to set aside a sale under a decree of foreclosure on the ground of fraud. The decree was entered and the sale made in 1860, and the bill was filed in 1865. Held that that there had been too great delay in instituting suit, and no sufficient excuse. The court says: "Without reference to "any statute of limitations, the courts have adopted the princi- "ple that the delay which will defeat a recovery must depend "upon the particular circumstances of each case."

Twin Lick Oil Co. v. *Marbury*, 1 Otto, 587.

Bill to set aside sale of corporate property on account of the fiduciary relations of the purchaser, filed four years after the sale. The court says: "The doctrine is well settled that the

" option to avoid such a sale must be exercised within a *reason-*
" *able* time. This has never been held to be any determined
" number of days or years, as applied to every case, like the
" statute of limitations, but must be decided in each case upon
" all the elements of it which affect that question." Held that the plaintiff came too late.

Cox v. *Montgomery*, 36 Ill., 396.

Bill to rescind a conveyance of land on the ground of fraud. Complainant discovered the fraud about six months after the sale, and delayed filing his bill about seventeen months. The court holds this an unreasonable delay, and refuses relief.

Hamilton v. *Lubukee*, 51 Ill., 416.

Bill to redeem from a sale under a mortgage, filed within four years after complainant had knowledge of the sale. Held not to be in apt time; that he should have taken immediate steps to set it aside, or a ratification of it would be implied. Relief refused.

Winchell et. al. v. *Edwards*, 57 Ill., 41.

Bill to set aside foreclosure sale. It appeared that Winchell, the ancestor of complainants, was present at the sale. The deed was made in October, 1850. In December, 1851, he left for California, having taken no steps to question the regularity of the proceedings. Held to raise a presumption of acquiescence, which would preclude him from setting the sale aside, and that his heirs were in no better condition.

Dempster v. *West*, 69 Ill., 614.

Bill to set aside a sale under a power in a mortgage filed seven years after the sale. Held that complainant should have acted with some degree of promptness, and that there was such laches as would prevent a redemption.

Kenyon v. *Schrick*, 52 Ill., 384.

Bill to set aside sale under foreclosure. Relief refused on the ground that six years had expired during which the land was occupied under title derived from the sale.

Robbins v. *Bates*, 4 Cushing, 18 months' delay held to be laches.

In this case it is shown that Jackson had good credit, and had control of considerable means, until after the Carrolls obtained their security, when he became publicly insolvent. (Record, p. 120.) After that, the only way by which either the Swifts or Carrols could collect any money was from their respective securities on two lots. The debt of the Swifts was not due until June, 1877, nearly a year after the public insolvency, and their interest had been regularly paid, so that they could not have taken any steps to foreclose or collect at law. The debt of the Carrolls was secured just before the collapse, so they were not delinquent. But Smith obtained the Williams note April 18, 1871; there was interest due Oct. 1, 1871, and April 1, 1872, before the principal was due, and that was payable Oct. 1, 1872. Yet he took no steps to collect one cent of interest or principal until this bill was filed, January 29, 1877, nearly six years from the time the note was pledged, and more than four years after the principal was due. The note of Jackson was due April 18, 1873, yet Smith voluntarily extended the payment, without any new consideration, from time to time, and in doing so, gave no attention to the Williams note held as security. The fact that Jackson paid the interest on his note, did not excuse an enquiry about the Williams note. Smith was guilty of gross neglect in not enquiring for Williams, or attempting to collect either interest or principal. Of what value, as security, was a note for the large snm of $30,000 on an unknown man, who did not for more than five years pay one cent?

It is very certain that Smith had no reliance on the Williams note, but trusted entirely to the personal responsibility of Jackson.

In considering the question of *laches*, the act of Smith's trustee and agent, Jackson, in executing a release of the lots, which was recorded August 3, 1872, and remained unquestioned until this bill was filed, is to be taken into the account. Whatever may be said about the taking of the deed of trust by the Swifts, to secure their loan, when no one appeared to object to the action of Jackson, as a trustee, for more than four years, they had the right to rely on the validity of their security. The Carrolls, still more, are entitled to the benefit from the laches of Smith.

Smith could have protected himself and saved the Swifts and the Carrolls from loss, while they have been guilty of no delay whatever. It is clearly unjust and inequitable to allow the man who has been the direct cause of the predicament in which the appellants are placed to throw upon them the entire consequence of his own neglect and fault. When Smith's note on Jackson fell due in 1873, he voluntarily extended it, holding the dormant Williams note as security, although he knew that the Swifts had loaned $50,000 on the release given by his agent and trustee, while the Swifts supposed, as they then had the right to, that the note had been satisfied. What stronger statement can be made to show the complainant is not entitled to relief on account of *laches*.

VII.

Conclusion.

The decree will be reversed for the reasons specified in Points I and II. By the terms of the decree, an amount is allowed as due on a note, while by the prayer of the bill an amount due on a judgment, which had been rendered on and extinguished the note, was asked. The amount is too large by

$554.27. If this was the only error it might be avoided by entering a remittitur in this court, but it is not. The decree is the ordinary decree rendered in the Northern District of Illinois, in a foreclosure before the decision in the *Brine* case, and no redemption after sale is allowed. For that error, the decree must be reversed, and the cause remanded.

The question will then arise, shall directions be given to the court below. The appellants are content to have the case remanded, without directions, for they believe the case can be put beyond question, regardless of the opinion of the court on the other questions involved. But if directions are to be given, what shall they be?

If reversed on Point III, the direction should be to dismiss the bill, for if no lien was created by the Williams trust deed, that is the end of the case. But if the court is not satisfied as to sufficiency of the proof that Williams was a fictitious person, or an alias of Jackson, we ask that leave may be allowed both parties to take further evidence.

If the court sustains the appellants on Point IV, the bill should be dismissed.

If the appellants succeed on either Point V or VI, the direction should be to enter a decree giving priority to the Swifts or the Carrolls, or both, as against the appellee, according to the view of the court as to the order in which they should stand.

This record presents a remarkable course of crime. As a matter of fact, there was no such man as George N. Williams. Jackson as agent for the owner, Charles C. Waite, sold the lots to Mrs. Moody for $60,000, and to cheat his client out of $14,000, pretended he had sold to Williams for $46,000. To accomplish this he signed the fictitious name of Williams to the notes and deed of trust, and introduced some person to his student, a notary, as the grantor, to acknowledge the deed, or in some way imposed upon him. The note for $30,000 was transferred to Silas M. Waite, who left it with Jackson to collect.

Jackson induced him to endorse it for that purpose, and afterwards, pledged the note to Smith to secure his own debt. Meanwhile, he kept remitting money to S. M. Waite, the owner of the note. Desiring to borrow $50,000 of the Swifts, he made a false release, and thereby imposed upon them. Later, he deceived the Carrolls, and induced them to accept a security as a mortgage, second only to the Swifts, to secure $50,000 more.

These are the real facts. If the case could be decided upon the actual facts, the case might be of easy solution. But it is to be decided according to the rules of law on the apparent facts. The questions are: Was a lien created by the Williams deed? Did Smith, under the circumstances, get a good title to the Williams note? Did the Swifts obtain a lien better than that of Smith? Did the Carrolls acquire a superior claim in equity to Smith? Is the complainant entitled to relief? These may all be embraced in the question, who is to suffer by Jackson's frauds?

W. C. GOUDY,

Attorney for Appellants.

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IN THE

SUPREME COURT OF UNITED STATES,

OCTOBER TERM, A. D. 1880.

JOSEPH SWIFT, ET AL.,

vs.

JANET SMITH, ADMINISTRATRIX, &C.

Appeal from Northern District of Illinois.

REPLY TO ARGUMENT FOR APPELLEE.

W. C. Goudy,

ATTORNEY FOR APPELLANTS.

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REPLY TO ARGUMENT FOR APPELLEE.

I.

THE DECREE IS FOR $554.27 TOO MUCH.

It is admitted that the court erred in finding the amount due, but it is said to be a clerical error. There is no proof that it was a clerical error. The evidence was submitted to the court and a certain sum was found to be due and the appellants required to pay it. How can that be called a clerical error? The complainant failed to prove the only allegation of the bill as to the amount due, which was averred therein to be due on a judgment, while a note only was produced, and that had been merged in the judgment. For this reason we are even justified in claiming that the court could not find anything due. The *allegata* and *probata* must agree.

II.

Redemption was not allowed by the decree.

Counsel for appellee attempt to avoid the *Brine* case (96 U. S., 627,) by claiming the decree to be merely to appoint a new trustee and direct him to execute the power according to the terms of the trust deed.

This position is not sustained by the facts. The decree finds: first, the amount due from Jackson to complainant on his note for $31,500; second, that complainant is entitled to a lien created by the Williams note for $30,000, and trust deed; third, that such lien is prior to that of any of the defendants; fourth that the premises be sold unless the amount found due is paid by the defendants within one hundred days; fifth, that such sale be made by Henry W. Bishop, one of the Masters in Chancery, upon giving notice of the time and place of such sale, according to the course and practice of the court; and sixth, that the complainant or one of the parties may become purchasers at the sale. The decree then contains a paragraph substituting Henry W. Bishop as trustee, in place of Jackson, for the purpose of making such sale under the trust deed in pursuance of the powers therein contained; but there is no order directing or allowing him to sell as provided in that deed.

The decree then proceeds with an order that the master (not the trustee), out of the proceeds, pay the fees and costs, and the complainant, and that he bring the surplus into court for further order. The decree further orders a surrender of possession to the purchaser, and a report of a deficiency, so that a personal decree may be entered, and finally concludes with a provision barring and foreclosing the equity of redemption.

With the exception of the paragraph substituting Bishop as trustee, the decree is substantially the same as in the Brine case.

This decree required notice according to the course and

practice of the court. This was a publication for twenty days; the deed required sixty days notice. The decree permitted the Master to select the place; the deed fixed the north door of the court house in Chicago. The decree required the surplus to be brought into court for disposition by it; the deed, that it should be paid to the grantor or his legal representative. The decree ordered the Master in Chancery to sell; the deed provided the sale should be made by the trustee. In short, this decree is the usual and regular decree of foreclosure according to the practice in Illinois, prior to the *Brine* decision, save the paragraph making a new trustee, but having appointed a new trustee the court proceeded to order a sale by the Master, just as it would do if there was a good trustee in existence by the appointment of the mortgagor.

The decree in *Orvis* v. *Powell*, 98 U. S., 178, is the same, and that was held to be erroneous.

III.

Williams was a fictitious person and the note and deed were not made by him.

It is said by counsel that this point is not available, because it is not made by the pleadings.

The complainant in the bill avers that Williams made the note and executed the trust deed. The defendants neither admitted or denied the allegations, but demanded proof.

If this answer was not satisfactory, exceptions should have been filed. But it was a good answer. The oath was waived, so the answer was a mere pleading. The averment of the bill was in proper form denied. The *onus probandi* was on the complainant. To prove that Williams made the note and deed, she was compelled to prove there was such a man. That she undertook to do by raising a presumption. The defendants at-

tempted to overthrow the presumption by evidence tending to prove there was no such man. It was not an affirmative fact asserted by the defendant and to be plead. There was no surprise. The answer speaks of the alleged trust deed and the supposed Williams. The first deposition taken by defendant was to prove there was no such man, and the effort was continued to the time of trial. The point was argued in the trial below and decided by the court as shown by the opinion of the circuit judge.

Counsel for appellee seem by silence to admit the correctness of the proposition in the appellants' argument, that enough proof was produced by the appellants to overthrow the presumption as to the existence of Williams and the execution of the note and deed by him, and that the burden having been shifted to the complainant and no proof being adduced, the conclusion is that he did not make the note and deed. But it is contended that Jackson, under the alias of Williams, created an *equitable mortgage* in favor of C. C. Waite, the payee of the note, and that such security was transferred by an assignment of the note to the complainant. Reference is also made to the fact that the note was for a part of the purchase money to be paid C. C. Waite.

If a lien was created by the facts disclosed in this record, it was either a vendor's lien, resting on implication, or one created by express contract.

Without discussing the question as to whether a vendor's lien existed in favor of C. C. Waite for the purchase money, it is enough to say that the complainant, as an assignee of the note, could not obtain relief and enforce such lien, because by the law of Illinois the vendor's lien is personal, and cannot be assigned or transferred.

Keith v. *Horner*, 32 Ills., 524.
Richards v. *Leaming*, 27 Ills., 432.
Moshier v. *Meek*, 80 Ills., 79.
Wing v. *Goodman*, 75 Ills., 159.

If, therefore, the complainant was entitled to relief, it was because of an express contract. On the face of the note and agreement, there was an ordinary contract by which a person named Williams made a note for $30,000 to C. C. Waite, and a deed of trust to Jackson, to secure the payment of the note, recited to be for part of the purchase money. This apparent contract fails, because there was no Williams. If Jackson had sold to Waite, under the power, it might well be doubted whether Waite would acquire any right. But it is said that if the note and deed were made by Jackson in the name of Williams, while there would be a failure of the contract in form, it is equivalent to a declaration that Waite had a lien on the land by Jackson, and that this constituted an equitable mortgage. I find no case where such a transaction has been held to be an equitable mortgage.

The cases in which an equitable mortgage has been allowed are cited in 1 Jones on Mortgages, ch. v, § 162, *et seq.* They are the opposite of a *legal* mortgage, in the fact that the form is not such as to vest a *legal title* in the mortgagee or trustee for him. In other respects the elements are the same. There must be parties competent to contract, a debt to be secured, and *intention* to pledge property as security—in all cases an express agreement; and when that agreement is in writing, a delivery of the written contract to the mortgagee and an acceptance of the written agreement by him.

In this case Waite supposed he was obtaining a legal mortgage and having the legal title vested in Jackson as trustee for him. This was a mistake, because there was no such person as Williams, the pretended grantor, and the deed was made by Jackson, the grantee. There was no *intention* on the part of Waite to receive an equitable mortgage. There was no intention on the part of Jackson to give any security; his purpose was to cheat Waite. There was no delivery or acceptance of a written agreement to or by Waite. The promissory note was

tempted to overthrow the presumption by evidence tending to prove there was no such man. It was not an affirmative fact asserted by the defendant and to be plead. There was no surprise. The answer speaks of the alleged trust deed and the supposed Williams. The first deposition taken by defendant was to prove there was no such man, and the effort was continued to the time of trial. The point was argued in the trial below and decided by the court as shown by the opinion of the circuit judge.

Counsel for appellee seem by silence to admit the correctness of the proposition in the appellants' argument, that enough proof was produced by the appellants to overthrow the presumption as to the existence of Williams and the execution of the note and deed by him, and that the burden having been shifted to the complainant and no proof being adduced, the conclusion is that he did not make the note and deed. But it is contended that Jackson, under the alias of Williams, created an *equitable mortgage* in favor of C. C. Waite, the payee of the note, and that such security was transferred by an assignment of the note to the complainant. Reference is also made to the fact that the note was for a part of the purchase money to be paid C. C. Waite.

If a lien was created by the facts disclosed in this record, it was either a vendor's lien, resting on implication, or one created by express contract.

Without discussing the question as to whether a vendor's lien existed in favor of C. C. Waite for the purchase money, it is enough to say that the complainant, as an assignee of the note, could not obtain relief and enforce such lien, because by the law of Illinois the vendor's lien is personal, and cannot be assigned or transferred.

Keith v. *Horner*, 32 Ills., 524.
Richards v. *Leaming*, 27 Ills., 432.
Moshier v. *Meek*, 80 Ills., 79.
Wing v. *Goodman*, 75 Ills., 159.

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sent to him, but the deed was filed for record by Jackson and kept by him.

A delivery and acceptance of a mortgage to and by the mortgagee is necessary. Without delivery, there is no mortgage.

1 Jones on Mortg., 884, and cases cited.

For these reasons there is no equitable mortgage.

What is this case?

Jackson procured from Waite a deed to a fictitious person, and made a deed in that name to himself, to secure the notes assigned by the same name. The note and deed of trust were forgeries.

WHARTON says: "Whether the name forged be that of "a merely fictitious person, who never existed, or of a person "actually existing, or a dead person, is wholly immaterial; it "is as much a forgery in one case as in the other; provided "the fictitious name be used for fraud in a particular instance "in question."

2 Wharton Crim. Law, 6th Ed., § 1,428.

The question, then, is: was an equitable right created by the forged note and deed of trust, on which relief will be given?

In *Chandler* v. *White*, 84 Ills., 441, this question was decided in the negative. In that case one Esty owned a tract of land subject to a mortgage, and he made a deed to Porter, a fictitious person, and forged a release of the mortgage running to Porter. Esty subsequently applied in the name of Porter to a bank to borrow some money, and offered to secure it by mortgage on the land. The loan was made. Esty furnished a note purporting to be signed by Porter, and also a deed of trust to Chandler purporting to be executed by Porter, securing the note. Afterwards Chandler, the trustee, filed a bill to enforce his lien against a purchaser under the first mortgage, which had been appar-

ently released of record. The claim was made that Esty borrowed the money, made the note and deed of trust in the name of Porter, and created a valid lien thereby, but the court refused relief.

The court say: "But we agree with the court below. "He (Chandler) took nothing under his deed of trust, because "it was forged. The cases cited in his brief do not meet "this question. It is quite true that a party may adopt and "be sued by any signature he choses; but the parties here "have not recognized this as a transaction with Esty. He "was acting, as he claimed, as a mere agent. He did not "sign his own name, or a name whereby it was understood "he was to become bound himself. The loan was not to "him. The legal title was not in him. The loan was to "Henry Porter, in whom was the title of record, and his "name was forged throughout the transaction. Whether "Porter was a myth, or there is, somewhere, other than as "represented by Esty, a person bearing that name, to whom "the conveyance was made, is immaterial. It was still a "forgery in Esty. Whether, if Esty were alone sued, he "would be estopped from setting up the forgery, we do not "think necessary to determine; but as to all others, we think "the court below properly held appellant could not enforce "a claim by virtue of a forged deed, or base any legal or "equitable right thereon."

It was contended by counsel in that case that Esty made the note and deed in the name of Porter, and thereby bound himself, but cases were cited to the effect that in order to accomplish that result the person must use the name as a substitute for his own, and intend to bind himself, and does not assume to mean or represent anybody else.

Brown v. *Butcher's B'k*, 6 Hill, 443.
Baker v. *Dennig*, 8 Adol. & Ellis, 94.
Harrison v. *Harrison*, 8 Vesey, 185.

Jackson did not intend to bind himself by the use of the name of Williams; he did not use it as a substitute for his own; he did assume to represent another person, who had no existence. For these reasons the note and deed of trust were forgeries, and could not be the foundation of any right. While Waite would not be without remedy against this fraud, and would probably have a vendor's lien (1 Jones on Mortg., § 208, and cases cited), yet such a right and remedy could not be transferred by an assignment of the note.

32 Ills., 524.

The complainant was not entitled to relief on the bill in this case, even if there was an equitable mortgage, because the bill states the case of a legal mortgage created by the deed of trust from the supposed Williams to Jackson. If there was an equitable mortgage arising upon the facts disclosed by the evidence, certain facts constituting an equitable mortgage should have been set up in the bill. Relief cannot be granted by a court of equity upon a case proved but not alleged.

IV.

The note did not belong to the Complainant.

Counsel for appellee claims that the question of the ownership of the note by complainant was not in issue. This is a singular position. The bill alleged that the note was duly assigned and endorsed to Silas M. Waite, in writing thereon, and by the said Silas M. Waite, about the date last, aforesaid, duly assigned and endorsed to said Obadiah Jackson in writing thereon, who thereby became, and on the 18th day of April, A. D. 1871, and before the maturity of said note was the legal owner and holder thereof, and entitled to receive the money due, and to become due thereon, and *so owning and holding said note*, said Jackson on said last named day executed a certain note for $31,500, to David

Smith, and that at the same time, said Jackson duly assigned and endorsed, and delivered to said Smith the said note for $30,000, made by the said George N. Williams, whereby the said David Smith became the legal holder and owner of said note, and the trust deed accompanying the same.

The defendants neither admitted or denied this statement, but demanded full proof of the allegations. If this does not make an issue as to the assignment and ownership of the note, I cannot see how it could be done. This fact lies at the foundation of complainant's right to relief.

It is claimed by counsel, that the complainant became the legal holder of the note by virtue of the assignments thereon, but she does not base her right to relief upon the fact that she is vested with the legal title to the note. She comes into a court of equity, and alleges that she is equitably entitled to collect the amount due on this note, as collateral security to Jackson's note, but we deny that she has any legal title to the note. The circumstances under which it was obtained from Jackson, furnished no right to this note, either in law or equity.

Silas M. Waite was examined as a witness, solely to prove that he was the owner of the note, and that the complainant was not. The opinion of the court shows, that the question was argued, and decided by the Circuit Court judge. This point is not raised, as stated by counsel, for the first time in this court, but it has been one of the main points of controversy from the commencement of the suit.

It is said by counsel, that Waite has not intervened and set up any claim to the note. This suit was commenced on the 29th day of January, 1877. Silas M. Waite was examined as a witness, May 12, 1877, and then obtained the first knowledge that the note was not in the possession of his own agent. The cause was tried, and a final decree entered on the 6th day of October, 1877. What Silas M. Waite has done since the final decree was entered below, this court does not know. All that

is known, is, that during the period of time in which he might have intervened in this suit, from May 12th to October 6th he did not appear. Waite was not under obligation to intervene at all. He had the right to file his original bill, as he was not bound in any respect by the proceedings of this court.

Counsel for appellee, assuming that no suit has been commenced, claim that if one were now instituted, Waite would be barred, by the lapse of time, from obtaining relief. That is a question which cannot be tried in this suit. Waite is not a party, and would not be bound by any decision the court might make upon that question. His first opportunity to commence any suit was on the 12th day of May, 1877. What reasons may be presented for not filing a bill since that time, this court has not before it, and will not indulge in speculations upon that question. I will not go out of the record, as counsel for the appellee have done, for the purpose of speaking of the real facts in regard to the ownership of this note, and the equitable rights belonging to the present owner. It is enough for us to show that the note did not belong to the appellee when she filed her bill and obtained her decree.

An effort is made to impeach the testimony of Silas M. Waite, by a statement of alleged facts not appearing in this record, and some criticisms are made upon his testimony, for the purpose of throwing discredit upon his statements. It was admitted in the court below, as shown by the opinion of the Circuit judge, that Waite was the owner of the note, and that Jackson held it, as an agent, for collection, and fraudulently transferred it to Smith. An examination of the deposition of Charles C. Waite shows that within one or two months after the note was given, he transferred it to his brother, Silas M. Waite, who held it for some years, and received payments upon it. It appears, from the deposition of Silas M. Waite, that it was transferred to him by his brother, Charles C. Waite, and that the note was placed by him with Jackson, for collection, simply as an attorney; that he endorsed the note in blank, in Jackson's office, at his request,

simply for the purpose of collection; that he never sold it to Jackson, in any manner; that Jackson had never held the note, except as attorney for the purpose of collection, and that he had supposed, up to the time of giving his deposition, that the note was still in the possession of Jackson, as attorney to collect, and that Jackson had, from time to time, remitted to him money on the note. It is impossible to have clearer testimony on the question of the real ownership of this note. There is nothing to contradict and impeach the statement of Silas M. Waite.

It is very certain that Silas M. Waite can, unless some defense is made not appearing in this record, file his original bill to enforce the collection of this note, and he may compel the appellee to surrender the possession of it to him, because it was obtained by her intestate from the possession of Jackson, the trustee of Silas M. Waite.

Smith v. *Ayer*, 101 U. S.

Whatever controversy exists between the appellee claiming liens on these lots and the owner of the note, must be settled by a suit between them and Silas M. Waite, or whoever Silas M. Waite may have transferred his right to. The complainant does not stand as a representative of Silas M. Waite so as to bind him; nor is Silas M. Waite entitled to the benefit of any decree that may be obtained by the complainant, without filing his original bill and asserting his rights in the premises. If he applies to a court of equity nothing in this record, or the decision of the court below, or of this court, will bind him. I repeat what was said in the argument in chief, that the complainant cannot obtain relief, because she is not the owner of this note, for the reason, first, the complainant must show *her* right to relief; second, she must prove the allegations of the bill; third, the decree does not bind Waite, and will not bar him from recovering from the defendants so that they may be compelled to answer twice; and fourth, the defendants may have a defense against Waite which is not available against complainant.

Conclusion.

It is not necessary to repeat any part of the former argument. The fifth and sixth points do not seem to be answered so as to require a reply. As to the question of laches, it is not merely a case where a note and mortgage have been given, in which a court of equity will grant relief until an action at law is barred. The holder of the Williams note had a trustee and by that trustee, the holder of the note declared it paid; and by that trustee the holder of the note released the mortgage. This release stood on the record for more than four years without question or objection. This was an acquiescence. The complainant now seeks the aid of a court of equity, which requires a removal or cancellation of the release of the trustee. The complainant has been delinquent in that respect. The Carrolls found that release had been on the record for more than four years when they took their security, without anything to indicate the note was unpaid, or the release fraudulent. This release was not void. It was made by a person authorized to make it. If improperly executed and recorded, affirmative action was required to set it aside. The Swifts could have collected their debt from Jackson, while solvent, if Smith had disclosed the fact the note was unpaid and the release fraudulent. This he failed to do for more than four years. These facts constitute the laches, and not the forbearance to sue on the note or foreclose a mortgage standing without any obstacle on the record.

The appellee has no stronger equity than the Swifts, or the Carrols. Smith took the Williams note as security in April, 1871, and laid it in a vault, where it remained undisturbed until after Jackson failed in November, 1876. No inquiry was made for Williams, and no interest collected. The principal fell due in 1872, and no effort was made to collect it. It was the duty of Smith to use diligence in collecting the money due on the note held as collateral—a duty to Jackson and the appel-

lants holding under him. There never was a case of greater carelessness. Had inquiry been made for Williams, the discovery would have been made that he was *non est*. The proper step then would have been to seek C. C. Waite and S. M. Waite, each of whom endorsed the note. That would have brought the information that Jackson had no right to transfer the note. It is evident Smith did not rely on the note as security. On the other hand, the Swifts collected interest promptly, and were delinquent in no respect. The equities were at least equal, while the appellee is chargeable with great neglect.

The question is, which is first in time? If the appellee has not secured a lien according to the statute, or rules of law, she has not the first lien, because it is conceded that the Swifts and Carrols have deeds of trust in strict conformity to the statute. If the appellee had the prior lien, but by acquiesence in Jackson's release and delay in an application to set aside and establish the lien, it has been waived or lost as against the subsequent incumbrances, then she has not the first lien. If the debt, represented by the Williams' note, is a lien, and the note is not owned by the appellee, but by S. M. Waite, then *she* has not a prior lien to the Swifts or Carrols. Whether Waite has or not, cannot be tried or decided in this suit.

W. C. GOUDY,

For Appellants.

OFFICE SUPREME COURT U.S.
FILED
NOV 22 1880
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1880.

JOSEPH SWIFT, EDWIN SWIFT, ELIZABETH CARROLL and ELLEN CARROLL,
Appellants.

—VS.—

JANET SMITH, ADMINISTRATRIX OF DAVID SMITH, DECEASED, *Appellee.*

Appeal from Circuit Court of the United States for the Northern District of Ills.

HON. THOMAS DRUMMOND, JUDGE.

No. 91.

BRIEF FOR APPELLEE.

W. T. BURGESS,
For Appellee.

CHICAGO:
JAMES GUILBERT, PRINTER, 164 S. CLARK ST.
1880.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

JOSEPH SWIFT, EDWIN SWIFT, ELIZABETH CARROLL and ELLEN CARROLL, *Appellants.* —vs.— JANET SMITH, ADMINISTRATRIX OF DAVID SMITH, DECEASED, *Appellee.*	*Appeal from Circuit Court of the United States for the Northern District of Illinois.* HON. THOMAS DRUMMOND, JUDGE.

Brief For Appellee in Answer To the Appellant's Brief.

My associate, Judge Van H. Higgins, prepared his brief in this case before we received the brief to which this is intended as a reply.

It is claimed by the appellants:

1. The amount of the decree in excess of the amount due on the note.

As the amount of this decree was the result of a finding in open court without a reference to the master, upon a computation then made it was simply a clerical error. The computation was made by the counsel for the complainant, and tendered to the counsel for the defendants as correct. He either examined it then and knew there was an error in computation, and refrained from taking any exception, or he did not examine it at all at the time, and discovered it afterwards; either way the mistake is not such as ought to entitle him to costs.

all, assumed, as part of the price to be paid by them for the land, the payment of this consideration money.

Assume that Waite and Jackson were the opposing negotiators, and then we find an instrument on its face, tripartite, that is, Williams to Jackson for the use of Waite, but in reality, Jackson executes the paper in the name of Williams, and declares that the land is held as security for the payment of a note; "being for a portion of the purchase money of the premises hereinafter discribed." (So this deed says expressly p. 58.)

Somebody executed this note and trust deed. The counsel say Jackson did, and then insist that because he executed a deed to himself for the benefit of a third person, Waite, named in it, that that third person is not entitled to the benefit of that declaration. The *light of analysis* is poured through a very fine aperture when it conceals instead of revealing an equity so obvious without its use.

The record from the State court (p. 31), shows that the cause was referred to the master to take proofs and report them. Under this order the parties appeared before the master on the 4th of April, 1877, (p. 45), and these three papers, the Jackson note, the Williams note, the Williams trust deed, were put in evidence (p. 46, 47, 52,) without objection, we were not called upon to prove the signatures, and closed our case, (p. 54), without proving it.

On the 12th of April, 1877, (p. 61), the defendants produce F. A. Hoffman, Jr., the Notary before whom the Williams trust deed was acknowledged. On cross-examination at (p. 62), this witness, being shown the deed, says—that the seal that is attached to the certificate is the one that I was in the habit of using at that time. At that time, some person came before me purporting to be the person who executed it. I never took any acknowledgment without some person appearing. There could not be a more particular person in that respect than I was. I never in my life took an acknowledgement without the person appearing before me, and I never took an acknowledgement of any person that I either did not know personally myself, or was not introduced to me by some party whom I knew to be a respectable party and worthy of belief.

The counsel for the defendants then re-examined him as follows:

"Q. Do you now recollect what parties came before you when you signed the certificate attached to this deed, that has been shown you?

A. I am satisfied with this much, that the party was introduced to me by Mr. Jackson. The way I would know that is from the examination of the paper itself, that it was somebody who was introduced to me by him; it was a thing that he did upon several occasions that I know of, and that was not unusual for him to do.

Q. Your belief is that the party who appeared before you, signed the certificate attached to the trust deed which has been shown you, was introduced to you by Mr. Jackson.

A. I am almost positive of it.

Q. And that is the only personal acquaintance you had with the party?

Yes sir, the only acquaintance I had with him."

It is clear then upon the showing of this witness, introduced by the defendants, that some one beside Jackson delivered this note and deed as his act and deed; and, even if we grant that he was Jackson's *man Friday*, he was not a *myth*. And if we go farther and grant that Jackson conspired with him to defraud C. C. Waite, is that any reason why these people who claim title through this *man Friday*, should not pay the consideration price for the land to the person to whom the note evidencing it has been assigned?

But the proof made by Hoffman, the appellants own witness, is simply conclusive that, while this business was being done, some one, who was introduced to him by Jackson as Williams, executed this deed. All the other proofs are simply negations, from persons who were not necessarily brought into contact with him. C. C. & S. M. Waite lived in New York, did the business through Jackson, and it will be seen that they fully identify this note as the one delivered with the trust deed, (p. 37).

Mrs. Moody, who bought from Williams, was not produced.

From a recital, at p. 118, in a deed from Mrs. Moody, by her attorney, to Charles V. Dyer, it is claimed that her husband, John K. Moody, was then, May 17, 1871, dead, and, though there is no proof of the fact, that she did the purchasing of this property from Williams through her husband. But even if she did, the deed from Williams to her was acknowledged.

Another officer came in contact personally with this *Man Friday.* He either knew him, or was guilty of mal-feasance in office, in certifying to it. So that it is necessary to assume that these two officers, the one, Mr. Hoffman, who certified to the deed from Williams to Jackson, and the one that certified to the acknowledgement of the deed from Williams to Moody, violated their official duties, in order to sustain the proposition, that Williams is a *myth.* If there was a person, who, by the name of George N. Williams, received this deed, and gave the one to Mary P. Moody, there was in the language of the law, cited by the counsel p. 23, of their brief "*a person in esse to give as well as receive the conveyance.*"

The counsel, alluding to the opinion of the Circuit Judge, holding that even if Williams was a fictitious person, it would make no difference, because Waite, through whom the parties claim title, would be estopped from setting up any right to the property, after what had taken place, say, that it is an evident misapprehension, and while conceding that Waite would be estopped from recovering back the land, upon the ground that there was no grantee, insist, that that is not the question in this case; but, on the contrary, they affirm the validity of that deed; that if it was not a deed to Williams, it was a deed to Jackson by the name of Williams; "and, *the appellants all rest on the deed from Jackson.*"

But Jackson's title is from Dyer, assuming to pay the trust deed. Dyer's is from Moody, assuming to pay this trust deed; Moody, from Jackson in the name of Williams, assuming to pay this trust deed, and Jackson gives Waite the trust deed under which we claim. Is not the chain complete that binds all these appellants —each link perfect?

They say, it is the trust deed *purporting* to be made by Williams to Jackson which is in controversy, and claim, in one and the same breath, that Waite could make a deed, conveying away his property to Jackson, in the name of Williams; but that Jackson, could not in the same name, and as part of the same transaction, convey back the same property as security for the payment of the consideration? Could the "light of analysis" pour a greater flood of darkness?

"The appellants do not claim under the disputed trust deed, but against it. Their trust deeds were made by Jackson and the question is, who has the prior lien?" A strange question to ask in a court of equity. The trust deed they dispute, given to secure the purchase money of the property; the one they claim under, given afterward by the same man to secure money loaned to him by these appellants, they knowing that the deed they now dispute, was given for that purpose—or charged by the record with that knowledge.

And to conclude our answer to this assignment, we refer to the case of *Peckham* v. *Haddock*, (36 Ill. 38) and the cases there cited. Concede that there was no such person as Williams, yet Jackson gives Wait a deed from himself to himself reciting that he, Jackson, is indebted $30,000 evidenced by a note of that amount, for the purchase money of the land described in it, and that he will sell the land to raise the money to pay the note. What was the intention of the parties? Was it not to charge the land with the payment of $30,000? So in the case cited: Where, after the note secured by a mortgage had been paid, it was held competent for the holder of the equity of redemption to make it a charge upon the land, and though the papers executed could not be held to be a mortgage technically, or a revival of a mortgage, yet, (P. 45.) "that it should operate as an agreement to charge the lands as an equitable mortgage. While we cannot give effect to an instrument so as to do violence to the rules of language, or to the rules of law, we are to give it such a construction as will bring it as near to the actual meaning of the parties, as the words which they saw fit to employ, and the rules of law will permit.

"In *Goodtitle D. Edwards* v. *Bailey*, Cowp. 597, *Lord Mansfield* said: 'the rules laid down in respect to the construction of deeds are founded on law, reason and common sense; that they shall operate according to the intention of the parties if by law they may; and if they cannot operate in one form, they shall operate in that which by law shall effectuate the intention.'

"In the case under consideration, although the agreement may not operate as a revivor of the mortgage at law, it may have effect as an agreement to charge the land consistently with the intention of the parties if it contains all the essential elements of such an agreement."

In the case at bar is there any doubt about the intention of Jackson to charge this land with the payment of the purchase money? Though he could not make a deed from himself to himself for the use of Waite, yet he could charge the land for its payment, and this instrument does that. If, in this transaction Williams was Jackson, to receive title, Williams was also Jackson to charge it with payment of the purchase money.

The affidavit to which counsel allude, p. 22 of their brief, was made Feb. 21, 1877. The bill was filed Jan. 29, 1877; a summons issued to first Monday of February returned, and then on this 21st February, 1877, two alias, one to Lee and one to Cook, were issued.

Afterwards, March 19, 1877, these appellants, the Swifts, file an answer in which they say, p. 17: "That as to whether on the 5th day of October, 1868, the said George N. Williams conveyed the said lands and premises by deed of that date, and subject to said alleged deed of trust to one Mary P. Moody, these defendants neither admit nor deny the same, but require strict proof thereof." *This is a distinct admission that such a person as George N. Williams existed, and a demand of proof that he executed the deed in question;* so that, *then* the appellants had no question of his existence and did not put it in issue. That he was a *myth* is evidently, upon the face of their own record, *an after-thought*, and a contradiction of the admissions made by them in their answer.

4. The *fourth* error: The title to the note not in the complainant, but in Silas M. Waite.

Here we have another issue sprung upon us not raised by the pleadings. The answers of these appellants do not say anywhere that Jackson being the agent for the collection of this note to the knowledge of the complainant, assigned it to him, that Waite, notwithstanding the legal title was in the complainant, still owned the note and should be a party to the suit. On the contrary, all that is said by the Swifts is, that as to the allegations in said bill contained that the said alleged note for $30,000 was assigned and endorsed by the said Charles A. Waite to Silas M. Waite, and, proceeding to set out in substance the allegations of the bill as to how David Smith obtained the note, that is, by assignment from C. C. Waite to S. M. Waite, and from S. M. Waite to Jackson, and from Jackson to Smith, concludes by saying: "These defendants neither admit nor deny the same or any part thereof, but require strict proof from the said complainant in these behalfs, and in each and every one of them." (P. 19.) The Carrolls simply put in a general denial of the bill, couched in the most general terms. (P. 28).

Now the issue thus tendered upon bill and answer, was fully met and sustained by the complainant on producing the note with the endorsements:

"Pay Silas M. Waite or order,

CHARLES C. WAITE."

"Pay to Obadiah Jackson or order,

S. M. WAITE."

"OBADIAH JACKSON."

Showing that she was the legal holder of the note, being in possession, and having the right to file up the blank indorsement to the intestate David Smith, or to herself as his adminstratrix.

There can be no dispute but that the legal title passed by this. The counsel do not contend that it did not. And their own statement of the issues in the case at page 25, of their brief, shows that nothing but the legal title to the note was in controversy; and after the issue thus presented by the pleadings, they say:

"unless the complainant was equitably entitled to collect the money, she had no standing in a court of equity, but must fail." But where in the pleadings in the cause is the equitable right of the complainant to this note questioned. That is new matter. To state it more directly, it is, that the complainant is not in equity entitled to collect the note, but some other person is. And therefore, without bringing that other person before the court to see whether he has any equity or not, the bill should be dismissed. This position concedes that there is a debt due, and that the parties are willing to pay it, *but do not know to whom to pay it.* Then why did they not set up these facts in their answer, and insist that this person should be before the court? But, from the beginning to the end of this record, the court may search in vain for any such proposition. They are very tender of Mr. Waite's interests. They even take his testimony to see if he has not got some. And yet, Mr. Waite does not interfere to protect his own right, and these appellants want our bill dismissed on the pretense that this man has got rights that he does not intervene and set up himself.

Even if Waite did now set up a claim to this note, he would be barred, as we have been in possession of that note claiming title to it long enough to bar any action he might commence against us for it. We had it when this bill was filed, long enough for that purpose. Nov. 1871, to Nov. 1876, is five years, and that is the bar to action of trover and conversion by Waite, against us for this note under the Statute. Gross Statute of Ill. P. 428, chap. 66, § 1. Or statute of 1874, p. 675, same chapter.

The counsel, p. 25 of their brief, say our position is, that "The rule of the law merchant as to negotiable paper is invoked, and it is claimed that the complainant's intestate acquired the note for a good consideration, before due, without notice that Jackson was not the real owner;" and that "the reply to this position is, that David Smith had notice that Jackson did not hold the note as owner, so that he could lawfully pledge it to secure his own debt, or at least that he had knowedge of such facts as charged him with the duty of inquiry, which is the equivalent of

notice." *But who can make such a reply as a bar to a suit?*" Supposing this all to be true, did not the endorsement on the face of the paper vest the legal title in David Smith? and who shall set aside that legal title? shall the man who owes the debt be allowed to plead that in bar? Because that is what this assignment of error amounts to.

It is clear in this case that Waite has knowledge that the person holding the legal title to this note is seeking to enforce its collection; and equally clear that he does not care to intervene. Having notice, and not intervening, could he for a single moment have a standing in court to compel these parties to pay it over again to him, or to insist upon the lien of it upon this land to their prejudice? Then why should this court reverse this decree, and dismiss this bill?

But the counsel may say we do not want the bill dismissed, but to have Mr. Waite made a party. Then why did they not raise that question of want of proper parties in apt time? It is in the nature of abatement, and should have been interposed at the earlist moment practicable.

The cases alluded to I think, will all be found to be those where the title to the note was raised between the holder of the note on the one hand, and not the maker, but the person claiming adverse to the holder, on the other. Of course in a Court of equity by proper proceedings, both of these parties may be before the court in the same suit; here they are not.

To ascertain the time when this note was, in fact, received by Smith, who is dead, there are some dates in other papers that I will call attention to, to settle that.

On referring to Watson's testimony p. 50, it will be seen that the note after it was transferred to Smith, remained in his custody. At p. 52, that he only recollects when the note was obtained from Jackson, from the date of Jackson's own note, April 18, 1871. It appears, p. 47, that Jackson and a Mr. Rice, owed Smith on a note for $31,500, and when it fell due, they could not pay it and wanted it extended, giving Jackson's individual note and as security, this Williams note and the trust deed.

The witness then had the title examined and accepted the security. But the note is dated April 18, 1871; and there is an endorsement on it made by Jackson, May 17, 1871, that interest was paid to that date. It reads:

"May 17, 1871—interest paid on the within note to this date, S. M. Waite by O. Jackson." Now, if we turn to Dyers deposition, p. 76, we will find an explanation of that.

He and Jackson in the Summer of 1871, bought this property subject to this trust deed, about three weeks after Jackson withdrew and Dyer took it alone. He took the deed from Mrs. Moody, dated this 17 May, 1871, (p. 118) and agreed to pay this incumbrance, with interest from the date of the deed. Of course, he wanted to know just how much was due, and as Mrs. Moody bought and sold subject to it, she wanted to know also, and to pay up to that date. So Jackson produces the note, receives the interest from Mrs. Moody to that date and so indorses it. But this was all done before Smith had any thing to do with the note, as Jackson never had the note after Smith got it. The fact, that Jackson's note was dated April 18, 1871, is accounted for from the fact that this was a renewal of the Rice and Jackson note, and would naturally be dated back as of the day when renewed, as it is for the same amount as the Rice and Jackson note given up.

Now, then, the indorsement by Waite is without date and vests title absolutely in Jackson, so that he enabled Jackson to act as the owner. If any one is to be injured it should not be Smith, who took the paper as belonging to Jackson, but Waite, who could have qualified his indorsement by the words "for collection" instead of making it an absolute one.

Silas M. Waite, for whose benefit this appeal under this assignment of error is prosecuted, *was* a banker in Brattleboro, Vermont. Bankers usually keep books of account and know what is due them, and the disposition made of *bills receivable*. He was examined, (p. 39,) in New York City, but his home, and presumably his books of account, were at Brattleboro, Vermont. He was not, however, accidentally caught in New York and examined there, for the complainant was, on motion of appellants, on the

7th of May, 1877, ordered by the court, (p. 33.) to produce this Williams note in New York City on the 10th, 11th and 12th days of May, 1877, for inspection by this Silas M. Waite, and his examination as a witness touching it. The note was accordingly produced, shown to him, identified by him, and he says, (p. 39, R. 82.):

I don't think I ever had it in my possession. My impression is that the note passed directly with my endorsement from my brother to Mr. Jackson. I think here (New York City) I can't say the exact time. I think Mr. Jackson was not present at the time.

Afterwards he says, (R. 84.):

I am now sure that I endorsed the note in his office, that is, in Mr. Jackson's office. If I am not mistaken, I endorsed that note with several other papers in Mr. Jackson's office, at Mr. Jackson's request. The note was transferred to me by my brother, and, as I remember it, when I handed the note to Mr. Jackson he requested my endorsement simply for the purpose of collection.

So, he first says that the note passed directly from his brother to Jackson, with his and his brother's indorsement on it in *New York City;* and Jackson not being present, presumably sent by mail or express to him;—then changes front and says, he passed it to Jackson in Jackson's office in Chicago, and put his, the witness', endorsement on it *there*, at Jackson's request for the purpose of collection. But, between these contradictory statements he said:

Moneys have been paid to me on this note by Mr. Jackson, the amount it is impossible for me to say here. I think not the full face of the note. And I can't answer what portion of the note, as near as I can remember, remains unpaid. My papers and all of these matters are in the hands of Mr. Jackson at Chicago, and I am uncertain what amount remains unpaid.

Now these appellants bring this witness all the way from Brattleboro, Vermont, to New York City on purpose to show on personal inspection of this note, that it belongs to him. Examine him away from his books and papers. His memory doubles upon

itself as to the place and circumstances under which he let Jackson have the note. His first story being that he was the mere conduit pipe through which the note passed from his brother to Jackson, and that it took place in New York City. And the second that he owned the note himself, and placed it in Jackson's hands in Chicago for collection. And because a witness with so frail a memory as to how and where he parted with this note, is not able to say *how much* of the note remains unpaid, therefore the court below should have presumed the *whole note* unpaid, and should have dismissed the bill; and this court should make the same presumption, and reverse this decree. But, if the party in interest, when called upon the stand for that very purpose, cannot tell *how much, if anything*, is due him, admitting all the time that he has been paid sums of money, unknown in amount on account of the note, *operating under the circumstances, as a purchase of it*, how can a court, *in the face of his absolute indorsement of it*, find anything due him, or that he has any interest in it?

This objection of interest in Waite is based upon the proof wholly, is not made in or by the pleadings. Those proofs then, should be certain, clear, leave no reasonable doubt that the purposes of justice require that the case should be remanded, to put the matter in issue and have it tried—otherwise the decree should be allowed to stand.

In this connection, however, I may be allowed to follow the counsel outside of the record for a moment. I said above that *Silas M. Waite was a banker*. He is so no more. There are some men whose crimes are so flagrant, that they become historical characters. This Silas M. Waite is the banker of Brattleboro, Vermont, who succeeded in wrecking a savings bank at that place by a course of perjury, forgery and false entries extending over a series of years, and whose flight, pursuit, capture and confession were the staple of news throughout the land. He, Silas M. Waite, whose course of crime is now so notorious, and Jackson, whose career of crime the counsel portray in their brief are, according to their theory of the case, the rival claimants of this

Williams note. I can only say of the twain, *par nobile fratrum.* Every body knows what and who Waite is. The counsel seem to know who and what Jackson was. They examined one, Waite, and he showed that he did not know whether he had any right to the note or not, and referred them to Mr. Jackson for the *papers* (P. 40, R. 83), and then they did not see fit to examine Jackson or call upon him for the papers.

The whole matter, being, as it is, for the benefit of outside parties, is a mere pretense on the part of the appellants, plainly not worth the serious consideration of the court.

Fifth. The lien of the complainant not prior to that of the Swifts or Carrolls.

To support this it is insisted, that the release made by Jackson, though *fraudulently* made, was operative to release the lien of the trust deed; that, although Jackson had assumed by matter of record, and of which all parties had notice to pay the debt which the trust deed was given to secure, yet, he could, without paying that debt, give a release to the person from whom he had bought and to whom he had assumed to pay it. This would certainly be extending the powers given by this trust deed, much beyond the fair intent of the deed itself and entirely outside of the facts under which the deed was given and which it was assumed by the parties, would remain constant to the end. When this deed was executed, it was not in the contemplation of the parties that Jackson would ever assume the payment of the debt secured by it.

The parties to it did not provide for any such remote and improbable contingency. It was not in the order of events, naturally, to be expected, and if in contemplation would have prevented his being appointed unless the parties to the transaction were all crazy. That a trustee should ever be called upon to sell his own property to pay his own debt, is one of the absurdities that the counsel in this case are bound to assume as coming within the ordinary duties of a trustee under such a deed, and which, it would be expected he would do with the greatest alacrity, or their defense is at an end.

The counsel cite C. R. I. & P. R. Co., vs. Kennedy, 70 Ill. 360; that the person executing the trust deed, selects the trustee, and "he should be required to sustain the injury flowing from the abuse of that power, rather than an *innocent* purchaser, who is led to believe that he can rely upon the *integrity* of the trustee chosen by the person creating the trust."

There are here two qualifications absolutely necessary to the rule as propounded. The person suffering must be *innocent*, and he must be in a position to rely upon the *integrity of the trustee*. But if the purchaser is not *innocent*, that is, if he has knowledge, and the *integrity* of the trustee is absolutely gone, how can he claim protection?

The counsel say (p. 33), that there is apparent justice in the position; that Jackson having acquired the title to the land, and having agreed to pay the debt, his assertion that he had, before he assumed to pay it, paid it, was not worthy of belief. I do not give their language, but I state my own propositions in my own way, and not as they see fit to state it; and they say "it is not sound in principle nor sustained by authority."

Why? They first say that an heir or legatee may be an executor. But an executor is the creation of the ancestor, who makes both him and legatee just as he pleases. There is not the slightest analogy in the cases.

They then say "that Smith holding the note for $30,000, allowed Jackson to remain in the position of trustee after the conveyance by Dyer." But there is not a scintilla of proof in the case that Smith ever knew of the conveyance to Dyer. And supposing he did, this was Jackson's own act purchasing this property and agreeing to pay the debt; he had disqualified himself for acting as trustee just as effectually as if he had given Smith a renunciation in a deed under seal of record. No lapse of time could change the situation until Jackson paid the debt, and then, of course, his trusteeship ceased. Smith could not, even if he would, have prevented Jackson from buying the land, and agreeing to pay the debt. And had he not had Jackson's own note, he would have been benefited by his additional personal responsibility for

the payment of the debt, and therefore would not have interfered had he known of it. So that he neither would nor could interfere. What propriety is there then in saying that Smith is to be prejudiced by this change of the relation of Jackson to the trust fund?

But Smith did not know of this purchase by Jackson, and he was not charged with constructive notice by the recording of the deed to him. So that the assertion "that Smith was satisfied to leave the power in Jackson's hands," is a gratuitous assumption by counsel not warranted by the record, but absolutely necessary for their argument. And the question is, had the Swifts or the Carrolls notice of the fact of the change of his, Jackson's relation to the property, either by the record or outside of it?

First, as to the Swifts.

A bare statement of the facts under which they aquired their lien, shows that they had such notice.

1. Dyer's deed to Jackson, (p. 67,) dated June 1, 1872, recorded June 18, 1872, contains this recital: "Subject nevertheless to a trust deed given by George N. Williams, dated Oct. 1, 1868, recorded in book 487 of deeds, page 172, to secure a certain note *on which is due* $30,000 *and interest* * * the payment of both of which is hereby assumed by [Jackson] the party of the second part."

On August 1, 1872, Jackson applies to the Swifts for a loan, and submits to their attorney, N. C. Perkins, (the trustee in the Swifts' deed) for examination. an abstract of title, of which a synopsis is given at p. 114, of exhibit 7, dated June 29, 1872. This did not show any release of the trust deed of record, but did show the deed from Dyer to Jackson, recorded June 18, 1872, the record of which is intact, and is there to this day. Perkins, as he says, took the abstract as stating all there was of this deed, but cannot say whether it stated the assumption by Jackson of the debt. It showed him however, that Jackson then owned the property. And his *integrity as trustee* in the eye of the law was at an end. It was not necessary to show that he had agreed to pay for the property this very debt. He had voluntarily assumed

toward the property, a relation that cast doubt upon his statements. For if this debt were not paid, the property he proposed to pledge was worth just so much less as security for the loan he was negotiating for. Finding this property thus charged of record, with this trust deed, and Jackson the owner of the land described in it, and so directly interested, what does Perkins do? He asks Jackson (p. 113) whether the note had been paid. And he, Jackson, told him in response that the note had been taken up and paid on that day,—the first of October, 1871. He says: "I should have taken his (Jackson's) statement at that time as being perfectly true." That is, notwithstanding the suspicious circumstances surrounding this transaction as stated in his answer, page 105: I think this trust deed from Williams to Jackson had not matured at the time. I think the note was not matured at time I saw Jackson, and asked him about that,—Perkins trusted Jackson's statements, *instead of the record.* Now Jackson claimed that his note had been anticipated and paid October 1, 1871, and we can readily imagine the reply of Perkins: I must have a release before I can pass the title. And as readily the reply of Jackson: I will bring you one. And he did so. He takes a blank which was not printed until after the fire. See the deposition of Bernard Callaghan, (p. 114 R. 256) not referred to in index to printed record, showing that the blank the witness produced, and the blank used by Jackson for this release, were printed after the fire of October, 1871. He dates it as of the day when he said the payment was made, and brings it to Perkins, not acknowledged; (p. 114 Perkins so says); then acknowledges it on the 3rd of August, 1872. While Perkins had commenced his examination of this title on the 1st of August, (p. 105). Perkins says in connection with it, (R. 252): "He told me that he dated it the 2nd of October, 1871, because on that day the note—the Williams note—had been paid and taken up." And at R. P. 253, he says: "I understood at the time that that date was put into the release for the reason that that was the date at which the payment was made." Jackson, according to this witness, nowhere claimed that he had executed a release on that day, Octo-

ber 1, 1871; and then that that was destroyed by the fire, and the one in evidence given to take its place, but that he, Jackson, dated it that day because he said the note was paid that day.

But the counsel admit on page 36 of their brief, that the Swifts, in accepting this security for Jackson's own debt, and in dealing with a trustee, were bound to inquire into his authority. But it would be idle to inquire from him as to his authority. That is not what the rule means. It is inquiry from the persons for whom he is trustee. That inquiry would have developed that the debt was not paid.

Second, as to the Carrolls.

Why is the case as to the Carrolls wholly different?

They had the same record before them that the Swifts had. It told them that on the 1st Oct. 1868, a trust deed was given by George N. Williams to Obadiah Jackson, to secure the payment of a note for $30,000 payable four years after date, that is Oct. 1st., 1872, with interest, given for the purchase money of the property to Charles C. Waite; of the conveyance from Williams to Moody Oct. 5, 1868, subject to this trust deed and assuming the payment of this note (p. 118); of the conveyance by Moody on the 17th of May, 1871, to Charles V. Dyer subject to this trust deed to secure this $30,000 note payable Oct. 1, 1872, which amount with interest from date Dyer assumed; of the conveyance by Dyer to Jackson the trustee, dated June 1, 1872, recorded June 18, 1872, subject to this trust deed and the note "on which is due $30,000 and interest" which Jackson assumed to pay and of a release executed by this Jackson, dated Oct. 1st, 1871; acknowledged Aug. 3d, 1872, recorded Aug. 3d, 1872; in which Jackion released the land from this trust deed.

So that they were confronted by the Record, with this state of facts: Jackson, on the 1st Oct. 1871, releases to Dyer land from a trust deed, and on the 1st of June 1872, buys the land, takes a conveyance subject to the trust deed and promises to pay the note secured by it. The land then is charged in Jackson's hands by matter of record, with the payment of this note as part of the purchase money, and yet it is claimed that the Carrolls could pur-

chase it, discharged of this equity, so placed upon it by matter of record by the person with whom they dealt.

What fault had Smith to find with this state of the record?

If Jackson did as he agreed to and the record bound him to do, would not he, Smith, be paid? The release by that assumption of the debt of record had become a nullity. Why it was executed does not appear on its face. It says (p. 90), "in consideration of one dollar to me in hand paid," but that would not justify the release, payment of any thing to him was not what was required, "and for other good and valuable considerations" but what it does not state. Certainly it does not say that the note was paid, which was the only circumstance that justified the trustee on the face of the deed of trust in giving the release. (p. 87, R. 185.)

And when these parties found the truth of that circumstance, practically denied by a deed executed afterwards, on the 1st June 1872, recorded 18th June 1872, and the acknowledgment of this release on Aug. 3d, 1872, and its record same day, it is a violation of all presumptions that govern men in the conduct of their affairs to say there was not enough to give them notice that they also dealt with a trustee who held property in trust for the payment of a debt then due and unpaid, and of which he had assumed the payment.

The Carrolls have not put in evidence, either the notes to them or the trust deed to Chandler to secure them. It will be seen, p. 120, that the parties stipulated that Jackson became publicly insolvent in November, 1876, and these notes and trust deed are charged in the bill, (p. 6.) to be dated November 13, 1876, convey other lands besides those in controversy; and it is also charged, page 8, (R. 18,) "that all of the defendants in this suit claiming title through said Jackson, had notice of the fraudulent character of said release, * * and were *mala fide* purchasers of said premises."

Now, relying upon the charges in the bill, as the evidence of their rights, and putting no evidence in themselves either the documents, or proving any consideration in fact, paid by them for them, I ask upon what principle do the Carrolls question this decree?

Sixth. The laches of complainant, a bar to any relief.

The counsel have cited some cases in support of the general proposition that delay will, in some cases, without reference to any statute of limitations, bar relief. But what has that to do with this case. The note of Williams remained a security until it had been past due sixteen years. (Laws of Illinois, chap. Limitations *supra.*)

We are not filing a bill asking equitable relief from the court, and every one of the cases the counsel cite, are of that character. And because where circumstances would render it inequitable by reason of the lapse of time for the court to grant a relief depending upon the discretion of the court therefor; in this case, where there is no discretion, but an absolute right to the relief prayed for, the court should refuse it, because of the mere lapse of time, without a single equitable circumstance to render that lapse of time a bar.

We could not file a bill against the Carrolls until they got title put on record, and we were advised of it. They filed their deed November 14, 1876, and we filed our bill on the 29th of January, 1877.

There is no proof when we were advised of the purchase by Jackson from Dyer. Why we should file a bill against Jackson, because he purchased this property and agreed to pay for it, we are at a loss to conceive. He is proved to be a man of abundant means, or supposed to be such, until November, 1876. How could we imagine that in extending the time to pay his debt to us, we were injuring anybody? The Swifts took their deed charged with a knowledge of facts of which we at the time knew nothing. It is palpable that until the 3rd of August, 1872, no release had been executed by Jackson. That very day he executed it and *eo instanti* without opportunity for us to object, they took their deed from him and put it on record. What was the use of our filing a bill afterwards. The mischief, if any, had been done.

But again Jackson buys this property from Dyer by deed, dated June 1, 1872; recorded June 18, 1872. And gives a

trust deed to Perkins dated June 1, 1872, before the record of the deed to himself. But this is not recorded until August 1, 1872. Now, conceding that we were bound to know from day to day every deed put on record, we could not know by the record of the deed to Jackson before by the papers he had conveyed it to Perkins, and the mischief was done.

Is it not absurd to talk about laches under these circumstances?

The counsel cite no authority, and he can find none that hold an extension of a debt secured on real estate discharges the lien, so that the extensions of this debt by Smith to Jackson, cut no figure in the case one way or the other. All parties dealt with Jackson as abundantly responsible down to Nov. 1876, and no one is to blame for such dealing more than another.

The counsel close their argument by asking that:

1st. As the decree is for too much that may be avoided by entering a remittitur in this court. That the court will do of course. But had the counsel taken exception to the amount when the decree was entered, it would then have at once been corrected, and as it is the only error in the record, and one the result of oversight on both sides, I do not think the court should award costs.

2d. The decree as substituting the master for the trustee in the deed is not within the Brine case.

3d. The point that Williams is a fictitious person has no merits, as the purchase price of the land has not yet been paid.

4th. The point that we are not the owners of the note, is answered by inspection of the note, and, if equities exist in third persons, the question should have been raised in the court below and not here for the first time, that they might there have been made parties.

5th & 6th. The Swifts and Carrolls are each postponed by matter of record, in the chain of title through which they claim to the incumbrance held by the complainant.

The complainant is not responsible for the errors or crimes of Jackson. His intestate dealt with him as an honorable man, and so did all the others. But the question remains, who has the equity

and justice of the case with them—certainly, our papers gave us no reason to suspect that these defendants or any person under whom they claim, had any defence to the payment of the note pledged with the complainants intestate.

W. T. BURGESS, for Appellee.

OFFICE SUPREME COURT U. S.
FILED
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JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of United States,

October Term, 1880.

JOSEPH SWIFT, EDWIN SWIFT, ELIZABETH CARROLL AND ELLEN CARROLL,
Appellants,

vs.

JANET SMITH, ADMINISTRATRIX OF DAVID SMITH, DECEASED,
Appellee.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

Appellee's Brief and Argument.

VAN H. HIGGINS,

Counsel for Appellee.

CHICAGO:
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1880.

IN THE

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(No. 91.)

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Appellee.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

STATEMENT OF FACTS.

On the first day of October, 1868, Charles C. Waite, then living in the city of New York, was the owner of the property in controversy. Obadiah Jackson, one of the defendants, was then an attorney at law, and resident of the city of Chicago, and the agent of Waite to sell this property. Jackson having informed Waite that he had obtained a purchaser, transmitted to Waite, for execution, a deed to George N. Williams, the alleged purchaser, and Waite duly executed on the 1st of October, 1868, a deed conveying the property to Williams, for the consideration of $46,000, $10,000 of which were paid in cash, and two notes were given purporting to have been signed by Williams, one for $6,000, payable in one year, and the other for $30,000, payable in four years, which

last note is the one in controversy, the $6,000 note having been paid; and to secure these two notes, Williams on the said 1st day of October, 1868, executed a deed of trust to Jackson. These notes were transmitted to Waite, and the note in controversy was by him assigned to his brother, S. M. Waite, then a resident of Vermont. S. M. Waite transmitted the note to Jackson for collection (the interest being payable semi-annually), having indorsed it in blank, thus clothing Jackson with authority over the note as apparent owner and holder thereof.

On the 5th day of October, 1868, Williams, by a warranty deed, conveyed the land to Mary P. Moody; and on the 17th of May, 1871, Mrs. Moody conveyed the land to Dr. C. V. Dyer, by a deed of warranty, subject to the $30,000 mortgage in controversy. Dr. Dyer conveyed the land in controversy to Obadiah Jackson, the trustee in the deed made by Williams to Jackson, on the 1st day of June, 1872. All these conveyances were made subject to the deed of trust made by said Williams for $30,000, already mentioned; and all these deeds expressly stated that the lands were subject to the said mortgage of $30,000, and that the respective grantees assumed and agreed to pay the debt to secure which the deed of trust was given. And in the deed from Dyer to Jackson, of June 1st, 1872, it is recited that the conveyance was made subject to the trust deed, on which was due $30,000 and interest, the payment of which was expressly assumed by Jackson. On the 18th of April, 1871, Jackson was then in possession of the Williams note of $30,000, indorsed in blank by C. C. Waite and S. M. Waite, and Jackson being indebted by note for $31,500 to the complainant's intestate, transferred to him as collateral security the $30,000 note secured by the deed of trust, said Jackson having written over the blank indorsement of S. M. Waite, "Pay to Obadiah Jackson or order;" and thereupon Jackson himself indorsed the note in blank by writing his own name thereon, he acting

throughout as and representing himself to be the absolute owner of the said $30,000 note.

For a considerable time after this transfer by Jackson to Smith, Jackson pretended to S. M. Waite to still hold the $30,000 note as his attorney and agent, and made remittances from time to time to said Waite to keep up the deception, said Waite having no knowledge that the note had been pledged to Smith. Said Jackson also continued to pay until October, 1876, the interest on his own note to plaintiff's intestate, and representatives. Jackson pretending to be the owner of the property, and being then considered responsible, though since insolvent, desired to raise money upon said property, and did in fact obtain a loan from Messrs. Swift, of Philadelphia, by pretending that the $30,000 note had been paid, and that it had been destroyed by the fire of 1871 ; that said property had in fact been released about the time of the fire, and that said release had been burned.

It further appears that the said $30,000 note at the time of the loan by the said Swifts had not yet become due and payable ; but said Jackson produced to their agent and attorney, in August, 1872, when this negotiation took place, a deed of release made by himself as trustee, to Dr. C. V. Dyer, and dated October 2d, 1871. This deed of release was not acknowledged or recorded until August, 1872, and the evidence shows it was executed about the time it was recorded, although purporting to bear date on the 2d of October, 1871. All the other deeds were executed at or about the time they bear date, and were within a short time after date duly recorded. Jackson it appears succeeded in borrowing about $50,000 from Messrs. Swift upon this property, in the early part of August, 1872, and gave to said Swifts a mortgage or deed of trust to secure the same.

The mortgage or deed of trust to Chandler for the use of Carrolls was made subsequent to the deed of trust for the benefit of the Swifts. There does not appear to

be any evidence in the record of any indebtedness to the Carrolls, except the recitals in the deed of trust. The Carrolls seem to have failed to put in any evidence concerning the indebtedness to them; but as their deed is subject to the deed of Swifts, and as the Swift incumbrance is greater than the value of the property, it is assumed that they neglected to make their proof on this account. But if the proof were all in concerning the validity of the claim of the Carrolls, it is believed that they occupy no better position than the Swifts, except in regard to the actual notice that the Swifts had through Perkins, their attorney, about the execution and delivery of the release deed by Jackson to the attorney of Swift, releasing apparently his own property, in plain violation of his duty as trustee.

The only question in this case, so far as the appellee is concerned, is whether the $30,000 note of Williams is a valid lien upon the property under the deed of trust of the first of October, 1868, given by Williams to Jackson, as against the Swifts and the other defendants, who also claim liens upon the property.

There are three principles of law that seem to be applicable to the facts in this case, which if applied, it is believed, will establish the validity of the lien of the $30,000 note upon the property in controversy, by virtue of the deed of trust given to secure said note.

I.

THE FIRST RULE OF LAW THAT APPELLEE ASKS TO HAVE APPLIED TO THE FACTS IN THIS CASE IS, THAT WHEREVER THERE IS A TRUST, AND NOTICE OF THAT TRUST APPEARS BY RECORD, ANY PARTY DEALING IN RELATION TO THE TRUST FUND, TAKES IT BURDENED WITH THE TRUST AND CHARGE IMPOSED UPON THE PROPERTY. OR, TO STATE IT IN THE LANGUAGE OF THE BOOKS, THE PURCHASER OF THE PROPERTY IS BOUND TO SEE TO THE APPLICATION OF THE PURCHASE MONEY.

Story's Eq. Jursp., Sec. 1127, 1131, a.
Duffy v. *Calvert*, 6 Gill. 487.
Downman v. *Rust*, 6 Rand. 587.
Bugbee v. *Sargeant*, 23 Me. 269.
Levett v. *Wooster*, 14 N. H. 550.
St. Mary's Church v. *Stockton*, 4 Halstead, 520.
Cadbury v. *Duval*, 10 Pa. St. 265.
Gardner v. *Gardner*, 3 Mason, 178.
Wormley v. *Wormley*, 8 Whea. 422.
Dalzell v. *Crawford*, 1 Pars. Eq. 57.
Hill on Trustees, pp. 342, 363.
*Adams Eq., *156, top paging 330.*

In this case the defendants had notice of the trust, by the record of the original trust deed, which was to pay specific debts, and they were bound to see to it that the trustee did not violate his duty. They were bound to see that he applied the money in discharge of the trust. The trustee had no right to release the trust deed, except upon the payment of the debt, and even upon payment the purchaser was bound to see that the money was applied in liquidation of the debt.

The defendants not only had notice of the trust by the record of the original trust deed, but they had notice, through the records and through the deeds under which they claimed, that the incumbrance was still unpaid.

The deed to Jackson, under whom all the defendants claim, and to whom the money was paid (if any money was paid), recites that the debt for $30,000 still exists, and that Jackson, under whom each of the defendants claim, assumed the payment of that debt of $30,000 specified in complainant's trust deed.

It will be observed by looking at the printed record, page 118, that all of the deeds in the chain of title recite that this $30,000 note is unpaid and remains an incumbrance upon the property; and that the grantees in each of the deeds assume the payment of this debt.

Each of these deeds being in the chain of title, there is a recognition at the date of the several deeds of the existence of the debt.

In the deed from Williams to Mary P. Moody on the 5th of October, 1868, there is an express recognition of the existence of this debt, and an agreement on the part of the grantee, Mary P. Moody, to pay the same as a part of the consideration money; in the deed from William P. Moody to Charles V. Dyer, dated May 17th, 1871, there is an express recital that the estate is taken subject to a trust deed given by George N. Williams to Obadiah Jackson, dated October 1st, 1868, recorded in book 487, page 172, to secure a certain note on which there is due $30,000, payable October 1st, 1872, with interest at eight per cent. per annum, which amount, with said interest from this date, the party of the second part hereby assumes as part of the consideration hereof. So that on the 17th of May, 1871, there can be no pretense that the mortgage had been paid.

The grantee in that deed, Charles V. Dyer, in his testimony on page 76 of the printed record, swears that he never paid any portion of the indebtedness; that he took the property subject to the said incumbrance, and expressly agreed to pay the same; that when he sold said property to Obadiah Jackson, the trustee named in the Williams trust deed, he sold it subject to the said mort-

gage of $30,000, and also subject to another mortgage, to James B. Runnion for a smaller amount. He also swears that no release was ever given to him or received by him, and that the pretended release was never delivered to him, and that he never saw it before giving his testimony in this case.

The deed from Dr. Dyer to Jackson is annexed to his deposition, and is marked Exhibit 5, and may be found on page 70 of the printed record.

This deed was dated on the 1st of June, 1872, and is more than six months after the pretended release and pretended payment of this incumbrance. At the date of this deed, it is clear that the incumbrance had not been paid, and the provision of the deed to Jackson, under whom the defendants claim, expressly recites that the conveyance is made "subject, nevertheless, to a trust deed given "by George N. Williams, dated October 1, 1868, re-"corded in book 487 of deeds, page 172, to secure a cer-"tain note on which is due $30,000 and interest; also "subject to a trust deed to James B. Runnion, trustee, "dated May 17, 1871, duly recorded in the Recorder's "office of Cook County, Illinois, the payment of both of "which incumbrances is hereby assumed by the party of "the second part."

The facts, as they appear from the record in this case, clearly show that there was a trust deed on record providing for the payment of a specific debt, viz., Williams' note for $30,000, which, without other proof would require the appellants, as purchaser, to see to the application of the purchase money to the payment of that debt. But in addition thereto, notice that the debt was unpaid was contained in the deeds to Jackson, under whom appellants claim title; that on the 2d of June (the date of the deed to Jackson), the debt was unpaid, and that it had been assumed by Jackson. It seems extraordinary that appellants should pretend that the debt had been paid and released in October, 1871, when the trustee, Jackson,

who pretended to release the property of that date, in his purchase of the property in June, 1872, expressly admits in the deed to him that it is unpaid, and he expressly agrees to pay the same as a part of the consideration to him.

II.

THE SECOND PRINCIPLE INVOLVED IN THIS CASE, AND UPON WHICH COMPLAINANT INSISTS THAT SHE IS ENTITLED TO A DECREE, IS THAT A PARTY CLAIMING TITLE TO LAND IS BOUND BY ALL RECITALS AND AGREEMENTS CONTAINED IN THE CHAIN OF TITLE UNDER WHICH HE CLAIMS.

The defendants in this case claim under Jackson, and in the deed to Jackson, dated June 1, 1872, it is recited that it is subject to the trust deed of complainant for $30,000, and that Jackson expressly assumes the payment of it.

The recitals in the deed to Mrs. Moody estop her, and all who claim under her, from setting up that the incumbrance of $30,000 was not due, as she expressly assumed the payment of it, and as it was a part of the consideration for the conveyance to her. She took the land clothed with the trust of paying that incumbrance, and is estopped from asserting its invalidity or non-existence, and so are all persons claiming under her.

Powell v. *Smith*, 30 Mich. 451.

In like manner all persons claiming under Dr. Dyer, to whom Mrs. Moody conveyed, are estopped from asserting that at the date of that conveyance, May 17, 1871, and recorded May 25, 1872, the premises were not charged with the payment of our $30,000 mortgage.

So, in like manner, all persons claiming under Obadiah Jackson, to whom Dr. Dyer conveyed by deed dated June 1, 1872, acknowledged June 14, 1872, and recorded June 18, 1872, are estopped from denying the validity of the $30,000 lien of our mortgage, which Jackson, the grantee in that deed, not only admitted to be due with

interest, but expressly assumed and agreed to pay. He took the land charged with that burden, and accepted a deed therefor, in which the lien was recited and assumed.

It was decided in the case of *The Schuylkill and Dauphine County* v. *McCreary*, 58 Penn. St. 304, that the acceptance of a deed by a grantee makes the recitals evidence against him; but not against a *bona-fide* purchaser from him without notice, as where the deed to the grantee was not recorded before the purchase.

But the deed to Jackson was recorded before the purchase. That deed to Jackson was recorded June 18, 1872, and the money was not paid by Swift until August 1, 1872; and Perkins' testimony (*Record, p. 103*) shows that it appeared on the abstract which he examined for Swift, August 1, 1872.

Now, although the deed from Dyer to Jackson, as set out in the printed record, pp. 71, 72, appears to have been filed for record June 18, 1873, this is a mistake of the printer or clerk in copying. For the document number is 37,963 in book 105 of records, page 197, and at that date it (the document number) would have been much greater, and the number of the book is 105, while the trust deed made to the Swifts on page 95 of printed record, which was recorded on the 3d day of August, A. D. 1872, was made in book 117, twelve books later than the book in which the deed to Jackson from Dyer was recorded.

Again, this same deed to Jackson is set out in the printed record in two other places, viz: On pages 66, 68, where it correctly states that it was filed for record and recorded June 18, 1872. This same deed is again set out in printed record on pages 89 and 90, in which it is correctly stated that it was filed for record June 18, 1872; so that the recital on page 72, that the deed was filed for record June 18, 1873, is clearly a mistake.

On page 102 of the printed record in this cause, Perkins swears that the memorandum on the back of Dyer's

deed to Jackson showed that it was recorded June 18, 1872.

The deed from Dyer to Jackson was on record at the time of taking the deed of trust by the Swifts, which latter deed was taken after the 1st day of August, 1872, as appears by the testimony of Perkins' printed record, pp. 105, 106. It further appears from Perkins' testimony (*Record p. 107*), not only that the Dyer deed to Jackson, assuming the payment of the $30,000 by Jackson, was recorded, but also that the deed appeared in the abstract of the title which Perkins was examining for the Swifts.

The doctrine that recitals in a deed duly recorded bind grantees and all claiming under them, is elementary and universal.

3 Washburn on Real Property, p. 100.
Croskey v. *Chapman*, 26 Ind. 338.
Carter v. *Jackson*, 4 Pet. 85.
Wiseman v. *Hutchinson*, 20 Ind. 40.
Slow v. *Wise*, 7 Conn. 214.
White v. *Kirby*, 42 Ill. 510.
Armenhout v. *Gibbons*, 30 Gratt. (Va.) 632.

"It is the duty of the party to examine the records, "say the authorities, and whether he does so or not, he will "be affected with notice of every fact, the knowledge of "which might there have been obtained. When a person "cannot obtain a title but by a deed, which leads to "another fact, whether by description, recital or otherwise, "he will be deemed cognizant of such fact, for it is *crassa* "*negligentia*, that he sought not after it. And for the "same reason, if the purchaser has notice of a deed, he is "presumed to have notice of the entire contents of the "deed."

Adams Equity, 326.
Sugden on Vendors, 1056.
See note 2, Adams Equity, p. 324.
Story's Eq. Jur., Sec. 400.

A party who obtains his title through a regularly executed deed of conveyance is concluded by its recitals.

3 Washburn on Real Property, p. 100.
Scott v. *Douglass*, 7 Ohio, 227.
Douglass v. *Scott*, 5 Ohio 194.
Hall v. *Orvis*, 35 Iowa, 366.
Reeder v. *Barr*, 4 Ohio, 459
Brush v. *Ware*, 15 Pet., 111.

"The question is not whether the defendant in fact "saw any of the muniments of title, but whether he was "not bound to see them. It will not do for a purchaser "to close his eyes to facts—facts which were open to his "investigation by the exercise of that diligence which the "law imposes. Such purchasers are not protected."

Brush v. *Ware*, 15 Peters, p. 111.

The defendants buying this property from Jackson, or advancing money to him on the security of this property, were bound by the recitals in the conveyance to Jackson, whether absolute or as security.

The most favorable position that can be occupied by defendants is that of being *bona-fide* purchasers, of which there is no evidence in the record.

The defendants have failed to prove that they paid the consideration or advanced any money, and have failed to prove the time when they advanced money to Jackson. They certainly did not acquire title to this property until they had actually advanced the money to the borrower.

In the recent case of *Schultz* v. *Honfes*, the Supreme Court of Illinois decided that the mere recording of a deed of trust given to secure a loan of money does not create a lien upon the property when the money has not in fact been paid over to the borrower. It becomes a lien against the rights and equities of a third person only from the time the money is in fact paid. (Case not yet reported.)

If the Swifts claim to be *bona-fide* purchasers, they were bound to show the payment of the consideration, and the time when it was paid. They have shown neither, and for the good reason that they did not advance the money until after the 3d day of August, 1872, as appears indirectly from the testimony of Perkins, for although he does not say they ever paid any money, he says he did not pass the title until August 3, 1872. He commenced the examination of the title on the 1st day of August, and ended it on the 3d.

Bassett v. *Nosworthy*, 2 Lead. Cas. in Eq., p 106.

In general, one who claims as a purchaser, must show that the consideration was valuable and actually paid, by calling witnesses who were present at the transaction, or some other legal means of proof, and cannot rely on the recitals in the deed, or the vendor's receipt, as evidence of the payment of value or any other fact material to his case.

Nolen v. *Gwyn*, 16 Ala. 725.
Kimball v. *Fenner*, 12 N. H. 248.
Rogers v. *Hall*, 4 Watts, 359.
Clark v. *Depew*, 1 Casey, 509.
Bolton v. *Johns*, 5 Barr; 151.
The Union Canal Co. v. *Young*, 1 Wharton, 410-432.

It may be claimed that Jackson, the original trustee, stated that the debt had been paid, and that the property had been released; and they had a right to rely upon his statement.

Jackson having accepted a deed reciting that the debt was still due in June, 1872, and having in that deed assumed the payment of that debt, even if the debt had been paid in October, 1871, he (Jackson) would be estopped from asserting such payment, as the fact had been

recited in the deed to him of its non-payment, and as he had expressly assumed the payment of that amount as part of the consideration; and if Jackson was estopped, so were all persons claiming under him with notice of the fact.

But the Swifts had no right to rely upon the statements of Jackson at all, and especially when such statements were in his own interest.

Le Neve v. *Le Neve*, 2 Lead. Cas. in Eq. p. 159.
Russell v. *Petrie*, 10 B. Mon. 186.
Bunting v. *Ricks*, 2 Dex. & But. Ch. 130.
Brice v. *McDonald*, 1 Maryland, 403.
Hudson v. *Warner*, 2 Harr. & Gill. 415.

It was easy for the Swifts or other purchaser of the property to inquire of C. C. Waite whether the $30,000 had been paid. On inquiring they would have learned that it was not paid, and that C. C. Waite had assigned the note to Silas M. Waite; and on inquiry of Silas M. Waite, they would have learned that the note had not been paid.

And as Jackson did not have at the time the Swifts loaned him the money even the possession of the note, and as the note did not mature until the 1st of October, 1872, it is clear that the Swifts had no right to rely upon the statements of Jackson, when Jackson was confessedly borrowing the money for himself, and when the release made by Jackson was clearly and plainly for his own benefit, and to release his own property from the burden of the Williams mortgage.

It was easy to inquire of Dr. Dyer whether the note had been paid. It appeared by the recital in the deed of June 1, 1872, that it had not been paid at that time; and it appeared that Dr. Dyer was not to pay the note, and that Jackson was to pay it at that date. A pretense then by the Swifts, that Dr. Dyer had paid this debt before it was

77 Illinois. no redemption,

due by its terms, and more than eight months prior to the time when Jackson assumed the payment of the note in the deed by Dyer to him, was absurd. Besides, the Swifts had no right to accept the statements of Jackson made in his own interests, even if Jackson, by his purchase of the property, had not extinguished his relation of trustee for the creditors, and even if he could be trustee after he had purchased the property.

How absurd for Jackson to pretend that the note had been paid, and the release executed, just before the great fire of October 9, 1871, when he had taken a deed for the same property dated and delivered in June, 1872, more than eight months after the great fire, in which he expressly assumed the payment of this identical debt, referring to it in language that did not admit of mistake or misunderstanding, in the following words: "Subject, nevertheless, "to a trust deed given to George N. Williams, dated Oc- "tober 1, 1868, recorded in book 487 of deeds, page 172, "to secure a certain note on which is due $30,000, and "interest," and subject to a trust deed to James B. Runnion, trustee, etc., both of which incumbrances are hereby assumed by the said party of the second part.

To pretend that the Swifts, who were bound to take notice of these recitals, can claim to be *bona-fide* purchasers, and that they had a right to rely upon the uncorroborated statement of Jackson, that the note had been paid in October, 1871, is too absurd to require refutation.

So far as registration is concerned, the rule under the recording acts in force generally in the United States is different from that under the registry acts in England, and it is held that the registry of a deed or mortgage is notice of its contents, and of equities created thereby or arising therefrom, to all persons claiming under the grantor, any title held by him at the time of conveyance.

4 Kent's Com. 174.

American Notes to Le Neve v. *Le Neve*, 2 Lead. Cas. Eq. p. 158–178, and cases cited.

Hughes v. *Edwards*, 9 Wheat. 489.
Cushing v. *Ayer*, 25 Me. 383.
De Lane v. *Moore*, 14 How. U. S. 253.

An unrecorded deed is in general good between the parties.

4 Kent's Com. 446, and cases there cited.

Where a subsequent purchaser has knowledge of the existence of such a deed, it is equivalent, as to him, to registry, and is treated as such, both at law and in equity.

Jackson v. *Leek*, 19 Wend. 339.
Speer v. *Evans*, 47 Penn. St. 141.
Vanmeter v. *McFaddin*, 8 B. Monr. 442.
McConnell v. *Read*, 4 Scam. 117.
Notes to Le Neve v. *Le Neve*, *et supra*.

Could a trustee release to himself in any case?

It appeared by the abstract of title, when the Swifts were having the title examined by Perkins preparatory to making the loan to Jackson, that Jackson accepted a deed from Dr. Dyer reciting the existence of this lien, and that $30,000 and interest was still due and unpaid, and that Jackson was to pay the same. This deed was dated in June, 1872. Jackson was conveying the property to Perkins as trustee for the Swifts, who were proposing to make the loan to Jackson. A release then by Jackson to Dr. Dyer was a release of a debt assumed by Jackson, and was a release of Jackson's own property from the lien of a mortgage, which he admitted was a valid lien and which he had agreed to pay. A release then to Dyer was a release to Jackson, the owner.

Swartout v. *Curtis*, 5 N. Y. (1 Seld.) 301.
Harrison v. *N. J. R. R. & T. Co.*, 19 N. J. Eq. 489.
Hawkins v. *Taylor*, not yet reported, decided by the Supreme Court of Georgia, August term, 1878, published in the Reporter, vol. 7, p. 105.

Abstract of opinion: "Could the mortgage be discharged by a payment from Taylor to himself? We think "not. True, Taylor as trustee is a different person from "Taylor individually. But when Taylor individually executed a mortgage, not to Taylor as trustee, but to Mrs. "Taylor and children by name, it would be a strained construction to say that he could discharge the mortgage by "canceling it or trading it and pocketing the proceeds. "Such a construction would utterly destroy the security. "It would be no security at all, so far as the mortgagor was "concerned, for he could destroy its force at any moment "by canceling or trading it, and receipting to himself."

III.

THE THIRD PRINCIPLE IS, THAT DEFENDANTS SWIFT HAD ACTUAL NOTICE OF THE RELEASE BEING EXECUTED BY JACKSON, AS TRUSTEE, AT THE VERY TIME WHEN JACKSON WAS CONVEYING THE PROPERTY IN HIS OWN RIGHT. JACKSON COULD NOT BE OWNER AND TRUSTEE; AND PARTIES DEALING WITH HIM AS OWNER HAD NO RIGHT TO ACCEPT OF A RELEASE MADE BY HIM AS TRUSTEE.

The testimony of Perkins, the attorney for the Swifts, is full and complete as to actual notice to the Swifts, that Jackson was releasing to himself. Jackson brought the release to him not acknowledged, and said he dated it back before the fire because the note had been paid prior to the great fire of October 9, 1871; and the release was ante-dated to Oct. 2, 1871, and was delivered to Perkins so ante-dated. The Swifts had no right to accept of the statement of Jackson that the note was paid.

Price v. *McDonald*, 1 Maryland, 403.
Russell v. *Petre*, 10 B. Monr. 186.
Bunting v. *Ricks*, 2 Der. & Bat. Ch. 130.
Le Neve v. *Le Neve*, 2 Leading Cases in Equity, 159.

Collateral Points in this Case.

Complainant's intestate, Smith, having taken this $30,000 note as collateral security for a *bona-fide* debt, is entitled to the same rights as an absolute purchaser of the paper. Smith took this note before due, and is entitled to all the rights of a *bona-fide* purchaser.

Swift v. *Tyson*, 16 Peters, 1.

Recognized and re-affirmed in the recent case of *Brooklyn City* v. *National Bank of the Republic*, decided by this court at the October term, 1879.

Bank of Woodstock v. *Kane*, 15 New Hampshire, 579.

S. M. Waite, the owner of the $30,000 note, indorsed it in blank, and thereby enabled Obadiah Jackson to impose upon the plaintiff's intestate.

And even if S. M. Waite did not receive a consideration for indorsing the note to Jackson (which from his testimony seems doubtful), still, as he clothed Jackson with the *apparent* ownership, he must sustain the loss rather than an innocent purchaser, and the title of complainant's intestate will be protected.

1 Daniels on Negotiable Instruments, §§ *839*, *844*, *856*.

9 Wallace (U. S. Rep.) 551, *Michigan Bank* v. *Eldred*. In this case, this court say:

"Bills of exchange or promissory notes may be transferred by indorsement, or, when indorsed in blank or made payable to bearer, they are transferrable by delivery; and the settled rule of law is, that if such a bill or note, so indorsed or made payable to bearer, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and is subsequently negotiated for

"a valuable consideration to a third person, who receives "it in the usual course of business, without knowledge of "the condition annexed to the possession of the instru- "ment, or of the means by which the possession was "acquired, his title is wholly unaffected by such breach "of trust, or by any such unauthorized or felonious "acquisition or appropriation of the note, and may re- "cover the amount against any of the prior parties to the "instrument."

It is claimed by appellants' counsel that we have not shown title to the note. The proof is clear that we bought the note of Jackson, to whom the owner had intrusted it, indorsed in blank, or took it of him in the usual course of business, before maturity. But if there had been no proof upon this point, the law is well settled that the mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports *prima facie* that he acquired it *bona fide*, for full value, in the usual course of business, before maturity, and without notice of any circumstance impeaching its validity; *and that he is the owner thereof*, entitled to recover the full amount against all prior parties.

1 Daniels on Negotiable Instruments, § 812.

The other pretense that Williams was a fictitious person has no foundation in the evidence in this case; but if it were true, it would not affect the complainant's rights, Jackson having represented to C. C. Waite, the owner of the land, that Williams was a real person and the purchaser of the property; and having induced C. C. Waite to accept of this mortgage and note in payment of the land, would be estopped in any future transaction from asserting the contrary.

And C. C. Waite having sold his land and accepted $10,000 in cash and $36,000 in mortgages, and having sold the $30,000 mortgage or note to S. M. Waite as a

valid note, would be estopped from denying the validity of his deed or the note which he had received in payment, and had assigned as a valid note; and C. C. Waite's land would pass by estoppel to the present owners, even if Williams had been a myth, of which there is no evidence.

Much more would Jackson and those claiming under him be estopped, by reason of the recital in the deed to Jackson that their title is subject to the Williams trust deed. They took their title clothed with this trust, and they cannot claim it divested of that charge, which they expressly agreed to accept it under.

Or, to put the case stronger, suppose the deed of trust and Williams' note had in fact never existed, or had been paid on the 2d of October, and that the parties in interest had agreed that the lien should continue, and that the debt should, as between them, be treated as due and unpaid; and that the conveyance to Jackson had been made upon that agreement, and had recited that such conveyance was made subject to the payment of Williams' note and mortgage, and Jackson had accepted the deed upon this condition, and containing these *recitals*. Would not Jackson and those claiming under him be bound by the *lien* so created. That they would is expressly held in the case of *Darst* v. *Gale*, 83 Ill. 137.

The claim of the appellants, who claim title under Jackson, who is estopped by the deed to him from denying the validity of our $30,000 lien, and who took the estate burdened with this charge, that by reason of the pretended *laches* of complainant in not enforcing our mortgage sooner, complainant has forfeited all her rights, is of no force. What *laches*, it may be asked? We took the mortgage and notes April 18th, 1871, and Jackson paid us the interest on the principal note semi-annually until October 26th, 1876. Our bill was filed to foreclose this Williams mortgage for $30,000 note, January 29th, 1877. As we took the Williams note as collateral security for the $31,500 note of Jackson, and as we extended

the time of payment and carried the indebtedness of Jackson at his request, the pretense that there has been *laches* in this case is without any foundation in fact. We had no occasion to examine the records to see whether Jackson had sold the property, or mortgaged it to the Swifts or any other person. "The holder of a lien is not "bound to ascertain whether any part of the land has been "aliened. He must be notified by the junior mortgagee "or grantee, and the recording of the mortgage or deed "by a junior mortgagee or grantee is not constructive "notice to a senior incumbrancer."

Howard Ins. Co. v. *Halsey*, 8 N. Y. 271.
Stuyvesant v. *Hall*, 2 Barb. Ch. 157.
Guion v. *Knapp*, 6 Paige Ch. 35.
Matteson v. *Thomas*, 41 Ill. 110.
Crane v. *Iglehart*, 42 id. p. 261.
Le Nerve v. *Le Nerve*, 2 Lead. Cas. in Equity, 310.

So that there can be no pretense that we had notice of the Swift mortgage, or of defendants' equities, if they have any. It would seem if they had notice by the recitals in our deed of the existence of our lien, and that their grantor had taken the estate burdened with our lien, and that the same was charged upon the estate purchased by them, that it was their business to hunt complainant or the holder of the Williams note. But they were not prejudiced by any delay. When the Swifts loaned their money, the Williams note was not due by two months.

And the Carrols having failed to put in any proofs, except paper recitals of having a conveyance, and having failed to show that they paid any consideration at any time, they do not occupy the position of *bona-fide* purchasers at all, even if they were not bound by the recitals in the deed to Jackson, under whom they claim.

But there is no authority to be found that will enable third persons to interpose objections to a foreclosure of an

incumbrance on the ground of *their* equities. The only equity that can be set up in such a case is the equities existing between the mortgagor and the mortgagee. *Vide*

9 Penn. St. Rep. 399, *Mott* v. *Clark*.
2 Johns. Ch. Rep. 442, *Murray* v. *Sylburn*.

Jackson, by his purchase of this property under the deed of June, 1872, made by Dr. Dyer to him, in which he assumed the payment of this $30,000 note and took his title subject to it, became the principal debtor in equity for the payment of this incumbrance, and the prior parties, Williams, Moody and Dyer, after the acceptance of that deed, were only sureties. The acceptance of that deed was equivalent to the making of a new mortgage by Jackson to secure the Williams note.

8 Hun. N. Y. 222, *Culv.* v. *Davis*.

A grantee of mortgaged premises, who purchased subject to the mortgage, and by his deed assumed to pay the same to a specified amount, as a part of the consideration money, cannot contest the question of the amount unpaid on the mortgage.

Ritter v. *Phillips*, 53 N. Y. 586.
Powell v. *Smith*, 30 Mich. 451.
1 *Jones on Mortg.*, chap. 17th, § 735.

If Jackson, the grantee, is estopped in law to deny the validity of the Williams note as an encumbrance, and if the rule of law estops his grantees from denying what Jackson is estopped from denying, it would seem to be conclusive of the rights of these parties.

Mr. S. M. Waite, who indorsed this note to Jackson in blank, and clothed him with the apparent ownership of the same, although a witness in this case, has not pretended to set up any claim to this note, or attempted to set aside the transfer by Jackson. He has acquiesced in the disposal of the Williams note by Jackson, and although we have held this note as a purchaser since April

18th, 1871, S. M. Waite has never sought to recover the possession of the Williams note since he endorsed it and left it with Jackson so endorsed in blank. He has never expressed any dissatisfaction with Jackson, and in his testimony on pages 39 and 40 of printed record, he says: "He "don't think he ever had the note in his possession. He "thinks the note passed directly with his endorsement "from his brother to Mr. Jackson." He swears that money was paid to him on this note by Mr. Jackson.

"But it is *impossible* for him to tell what amount. "He thinks he has not paid for the note in full. The last "payment made to him by Jackson on this note was in "the latter part of 1874." It seems from his testimony that Jackson paid him for this note after he sold it to complainant's intestate. But whether Jackson has paid S. M. Waite in full for the note or not, would seem to be no concern of defendants. Waite has acquiesced for eight years, and does not now claim the note; and if he did, he could not recover it as against complainant, who is a *bona-fide* purchaser.

It would seem as though S. M. Waite's testimony, who can recollect so little in regard to Jackson's paying him for this note, and the amount paid him by Jackson, would not be very trustworthy in matters pertaining to the terms upon which Jackson took this note.

There is no evidence in the record that in any manner impeaches the title of complainant to this Williams note, and as the burden is on the defendant to impeach our title, setting up a title in a third person by the defendants, when that third person, who is a witness in this case does not pretend to claim it, ought not to meet with *great* favor.

We have no doubt anticipated points that may not be made, but the importance of this case to our clients must be the apology for the prolixity of the argument.

VAN H. HIGGINS,

Counsel for Appellee.

Term No. 91. Gen. No.

IN THE

UNITED STATES SUPREME COURT.

October Term, A. D. 1880.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

JOSEPH SWIFT et al.,
Appellants,

vs.

JANET SMITH, Administratrix of DAVID SMITH, Deceased,
Appellee.

Appellee's Brief and Argument.

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